

**A CRITICAL ANALYSIS OF THE LAW ON
SEXUAL HARASSMENT IN THE WORKPLACE IN SOUTH AFRICA
IN A COMPARATIVE PERSPECTIVE**

by

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Abstract

A central feature of sexual harassment in the workplace is that it essentially involves two sides of a coin, that is to say, an impairment of dignity, self-esteem, self-worth, respect, *ubuntu*, individual autonomy, and equality from a positive aspect and freedom from insult, degrading treatment, disrespect, abuse of trust and unfair discrimination from a negative aspect. The overlap between equality and dignity as founding values of the Constitution, constitutionally entrenched rights, and values underpinning the limitation clause in the Constitution is explored with a view to illustrating why sexual harassment is unacceptable in an open and democratic South Africa. The central theme of the thesis is that the future of the law on sexual harassment lies in the adoption of a multi-dimensional approach which focuses on dignity/*ubuntu* because there can never be equality without respect for dignity/*ubuntu* which is an essential pillar in the celebration of self-autonomy and humanity in a democratic society. A central focus of the research is that the harm of sexual harassment gives rise to various remedies, which are not mutually exclusive. The plaintiff can use one or more of the available remedies because sexual harassment is potentially a labour issue; a constitutional rights matter; a delict; unfair discrimination and can even manifest itself as a specific offence in criminal law.

A wide range of data collection methods were used including reference to South African judicial precedent; legislation; selected foreign case law; the Constitution; textbooks; journal articles; feminist theories; and international conventions. The aim is to underscore the impairment suffered by women through sexual harassment, which includes economic harm, psychological harm, unfair discrimination, work sabotage, unequal access to employment opportunities and abuse of organizational power by supervisors. The multiple facets of the harm of sexual harassment such as treating women as sub-human, un-equal and as sub-citizens in total disregard of their constitutional rights, self-autonomy and *ubuntu* is highlighted in an effort to identify the essence of sexual harassment. The judicial tests, which determine whose perception of the nature of sexual harassment is decisive, are described. The focal point of the thesis advocates a judicial test for identifying sexual harassment, which is gender neutral, objective, and promotes the objects, purport, and spirit of the Bill of Rights by offering equal protection before the law.

A critique of the current law on sexual harassment in South Africa is conducted in the light of the *common-law* principles of vicarious liability. An evaluation is made of how and to what extent the South African case law is compatible with Canadian and English authorities. This was done by broadening the scope of employment test to include approaches compatible with an abuse of power and trust; frolic of one's own; enterprise risk; mismanagement of duties; and abuse of supervisory authority and the sufficiently close nexus between the wrongful conduct and the employment. The United States supervisory harassment approach, which focuses on sexual harassment as an abuse of power or trust in employment relations, is critically regarded as having truly captured the essence of the risk of abuse inherent in the supervisor's delegated power. Statutory vicarious liability in terms of labour law is underscored because it is distinct from the *common-law* principles of vicarious liability in creating an element of deemed personal liability on the part of the employer for failure to take steps and ensure the eradication of gender discrimination. It is observed that women cannot be liberated as a class (gender equality) if they are not liberated as autonomous individuals (dignity). It is concluded that South African law is in harmony with the Canadian and English authorities on sexual harassment in the workplace and has the potential to deal adequately with sexual harassment cases in the workplace but only if attention is paid to the proposed emphasis and suggestions made in the thesis.

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Chapter One - Introduction

The purpose of this research is to bring an endemic problem of sexual harassment, which has always been a private problem with women suffering in silence, into a public arena warranting legal intervention and legal redress. The focus is on sexual harassment in the workplace. Statistics indicate that sexual harassment is prevalent in the workplace and is a worldwide problem, which is not unique to South Africa.¹ The harm of sexual harassment 'is receiving increasing attention, especially in the context of women's rising rates of participation in the labour force and enhanced legal and regulatory provisions'.²

The research will focus on sexual harassment of women because 'the perpetrators are, overwhelmingly, men' and 'women hardly ever do this to men'.³ In South Africa, given the history of apartheid, the challenge is even greater because women have faced multiple barriers of colour, gender, and class. It will be highlighted that women can never be free of male domination

¹ United Nations Economic Commission 'Addendum 1: 2003 Report of the Special Rapporteur on Violence Against Women Developments in the area of violence against women (1994-2002)' (6 January 2003) at 107-8, noted that the Women's Legal Centre estimated in July 2001 that 76 per cent of women had experienced some form of sexual harassment and that 40 per cent of these women had quit their jobs or changed jobs as a result of the harassment. See <http://www.eeoc.gov/stats/harass.html> (accessed 16 November 2006). In 2005, 12,679 sexual harassment charges were filed with the United States Equal Employment Opportunity Commission, only 14.3% were filed by males. The United Nations Fact Sheet 'Ending Violence against Women: from Words to Action. Study of the Secretary-General' (9 October 2006) has also noted that 'women experience sexual harassment throughout their lives' and 'between 40 and 50 per cent of women in the European Union reported some form of sexual harassment in the workplace'. See also http://en.wikipedia.org/wiki/Sexual_harassment (accessed 16 November 2006) which states that 'a 2006 Government study in the United Kingdom revealed that 2 out of 5 sexual harassment victims in the UK are male, with 8% percent of all sexual harassment complaints to the Equal Opportunities Commission (Britain's EEOC), coming from men'. D Chappell and V Di Martino *Violence at Work* 3ed (2006) at 60-2 note that sexual harassment 'is commonplace throughout the entire developing world' - 'a survey in Nigeria revealed that young female university graduates seeking employment are routinely required to grant sexual favours before their academic credentials can be evaluated' and 'in Hong Kong, China, 440 of the estimated 220, 000 foreign domestic workers had been raped by their employers'.

² United Nations General Assembly 'In-depth study on all forms of violence against women: Report of the Secretary-General' (6 July 2006) at 42.

³ CA MacKinnon *Women's Lives, Men's Laws* (2005) at 129.

until they are treated with dignity and as equal to men in the workplace. This point is highlighted in the following extract:

Implicit in the concept of freedom is the concept of equality, that men and women 'naturally' constitute a universal fraternity and the attainment of human equality is a social goal... To concede inequality is to concede the right of the dominant to dominate, as a person, a class, a race, a gender or by dint of any other biological or technological advantage. The dilemma is that while freedom and equality are universally acceptable values, inequalities and non-freedom are endemic.⁴

The former President Nelson Mandela stated at the opening of the first democratically elected Parliament in South Africa that 'it is vitally important that all the structures of Government, including the President should understand fully that freedom cannot be achieved unless women have been emancipated from all forms of oppression'.⁵ The central theme of the thesis is that there can thus be no freedom or liberation if women are not free from all forms of bondage and inhumanity, and are treated as objects of men's autonomy in total disregard of their dignity and *ubuntu*, rather than subjects of their own self-autonomy. Samora Machel, the late President of the Front for the Liberation of Mozambique,⁶ affirmed that women's emancipation was an integral aspect of revolutionary struggle for a truly democratic state:

The emancipation of women is not an act of charity, the result of a humanitarian or compassionate attitude. The liberation of women is a fundamental necessity for the revolution, the guarantee of its continuity and the precondition for its victory. The main objective of the revolution is to destroy the system of exploitation and build a new society, which releases the potentialities of human beings... This is the context within which women's emancipation arises.⁷

The thesis focuses on sexual harassment in the workplace in the context of an employer-employee relationship because sexual harassment is more likely to poison the workplace as a 'forum for pluralistic exchange and destroys the possibility of constructive engagement'.⁸ The aim of the thesis is

⁴ Institute of Black Research: Black Women Workers 'A Study in Patriarchy, Race and Women Production Workers in South Africa' (1991) at 12.

⁵ Opening speech to the South Africa's first democratically elected parliament (24 May 1994).

⁶ FRELIMO is the founding party of the Republic of Mozambique and has been in power since 1975.

⁷ Opening address to the first conference of the Mozambique Women's Organization (1973).

⁸ S Estreicher *Sexual Harassment in the Workplace - Proceedings of New York University 51st Annual Conference on Labour* (2001) at 374.

to bring the harm of sexual harassment under spotlight and highlight how sexual harassment pollutes the workplace, hinders career development, violates constitutional rights,⁹ and undermines the values of the Constitution. It will be emphasized that South Africa can never be an open and democratic society if women are not emancipated and are treated in total disregard of their self-autonomy; dignity; *ubuntu*; competence; skills; and integrity.

The second chapter starts by defining sexual harassment in an effort to outline the parameters within which sexual harassment must occur to afford legal protection and to enable the plaintiffs to better identify sexual harassment when they experience it. An important feature of the thesis is to identify the problem of sexual harassment and help underscore the subject of sexual harassment in order to lay a foundation for the discussions that ensue in the remainder of the thesis. Sexual harassment 'the legal claim' has been defined by MacKinnon as 'a demand that state authority stand behind women's refusal to sexual access in certain situations that previously were a masculine prerogative'.¹⁰ The act of sexual harassment can also be defined as a violation of '*ubuntu*' in that:

Subordination of women to men is socially institutionalized, cumulatively and systematically shaping access to human dignity, respect, resources, physical security, credibility, membership in community, speech and power.¹¹

Having identified sexual harassment in chapter two, the third chapter explores the judicial tests of the reasonable man; the reasonable woman; the reasonable person with the same fundamental characteristics; and the reasonable person in the position of the victim test, which determines whose perception of the nature of sexual harassment, is decisive. A judicial test, which is gender neutral; objectively determined; and promotes the spirit, purport, and objects of the Bill of Rights thereby protecting the rights of women and men alike in the workplace, will be proposed.

⁹ See the Constitution of the Republic of South Africa, 1996.

¹⁰ CA MacKinnon *Feminism Unmodified: Discourses on Life and Law* (1987) at 104-5.

¹¹ MacKinnon *op cit* (n3) 25.

The fourth chapter deals with sexual harassment as a form of gender discrimination amounting to unfair discrimination in terms of section 6(3) of the EEA, and examines the essence of the wrong of sexual harassment (besides the fact that it happens to women because they are women). Attention will be given to feminist theories advanced by various writers on why sexual harassment is wrong taking into account the dynamics of the harm of sexual harassment that include economic harm, psychological harm, unfair discrimination, work sabotage, unequal access to employment opportunities and abuse of organizational power by supervisors. Gender discrimination is 'likely to inflict greater harm within the workplace than in the public square partly because of the close and ongoing personal engagement that the workplace compels'.¹²

In chapter five, consideration will be given to finding the employer personally liable because of a breach of a non-delegable duty of care. Various remedies will be explored which are available to the victim of sexual harassment in terms of breach of the contract of employment; delict; the *actio iniuriarum*; and the constitutional protection of dignity which is entrenched in the Bill of Rights. A central focus of the thesis is the dignitary harm suffered because of sexual harassment and an infringement of a woman's physical self, personality rights, and woman's freedom to choose with whom she associates, intimately as suggested by Ehrenreich:

Sexual harassment subjects an individual to behaviour that violates basic standards of decency and privacy; rather than choosing the people with whom she will become intimate, the victim of sexual harassment has sexual intimacies forced upon her by her harasser.¹³

The overlap and distinction between the scope of protection of dignity in delict and in terms of the Constitution will be emphasized. The positive steps, which have been taken by the Constitutional Court to protect the right to dignity, which is the cornerstone and founding value of the Constitution from which all other rights entrenched in the Bill of Rights flow, will be

¹² Estreicher *op cit* (n8) 374.

¹³ R Ehrenreich 'Dignity and Discrimination: Towards a Pluralistic Understanding of Workplace Harassment' (1999) 88 *Geo LJ* 1 at 27.

outlined. The *common-law* tort remedy in the United States will be critically evaluated, and compared to the wider protection of dignity in South Africa in terms of the Constitution and under the *actio iniuriarum*. Chapter six will examine and review the existing labour law remedies of personal liability and *statutory* vicarious liability of the employer dealt with in terms of the Labour Relations Act (LRA)¹⁴ and the Employment Equity Act¹⁵ ('EEA'). It will be highlighted how the promulgation of the 2005 Code of Good Practice on the Handling of Sexual Harassment Cases ('2005 Code') which forms part of the EEA, has added considerable value in outlining how and to what extent the employers must be pro-active in dealing with sexual harassment in the workplace.

Furthermore, the thesis will critically evaluate whether the current labour law remedies are sufficiently developed to cope and deal with sexual harassment in the workplace. One of the focal points of the thesis is the *statutory* vicarious liability in terms of section 60 of the EEA which creates a unique type of *statutory* vicarious liability and contains an element of deemed personal liability on the part of the employer for failure to take steps and ensure compliance with the EEA. It will be emphasized that the advantage of *statutory* vicarious liability is that it is neither a true reflection of *common-law* liability nor an equivalent to *common-law* vicarious liability. Furthermore, it is not subject to the rules of scope of employment and is uninformed by the delictual rules of vicarious liability. It will be highlighted that the employer will only successfully raise the affirmative defence in terms of section 60(4) of the EEA if it has taken pro-active steps to prevent sexual harassment rather than adopt a casual reactive approach and deal with sexual harassment as and when it occurs.¹⁶

¹⁴ 66 of 1995.

¹⁵ 55 of 1998.

¹⁶ See Y Slabbert *Sexual Harassment in the Workplace* (1994) Unpublished LLM Dissertation, University of Cape Town at 70, correctly supports the pro-active approach to sexual harassment 'to create public awareness of the incidence and impact of sexual harassment' and opines that the peril of sexual harassment in the workplace should be dealt with 'by

Chapter seven analyzes the historical development of the remedy of vicarious liability in South Africa, United States, United Kingdom, and Canada. It will be highlighted how the courts in South Africa and in *common-law* jurisdictions narrowly and rigidly applied the principle of vicarious liability in a way that resulted in denying protection to the victims of sexual harassment for what is perceived as a 'frolic of one's own', 'personal', or 'not within the job description' of the perpetrator to harass employees.

The thesis is a study of the law on sexual harassment in the South African workplace. However, a comparative study will be used in relevant and important aspects to show how and to what extent the developments in Canada, United Kingdom, and the United States were instrumental and persuasive in the *common-law* evolution of sexual harassment law in South Africa. This was done by broadening the 'scope of employment' test to include: approaches compatible with an abuse of power and trust; 'frolic of one's own'; enterprise risk; mismanagement of duties; and abuse of supervisory authority. The effect of the broadening of the scope of employment was thus to enhance legal recourse and protection, thereby bringing to fruition the constitutional promise to the victims of sexual harassment.

The use of the comparative method in the thesis is desirable in the light of section 39 of the Constitution, which enjoins the courts to consider international law. Furthermore, 'there can be no doubt that it will often be helpful for our courts to consider the approach of other jurisdictions to problems that may be similar to our own'.¹⁷ In so doing, the courts can identify the best solution for South Africa and enhance the legal protection of the constitutional rights often violated by the wrong of sexual harassment. In addition, the essence of the Constitution as the highest law of the land,

addressing the root of the problem and not just the consequences thereof after it has occurred'.

¹⁷ O'Regan J in *K v Minister of Safety and Security* (2005) 8 BLLR 749 (CC) at para 34.

prescribes that all law must be infused with the values and the rights entrenched in the Constitution and thereby reflect the democratic change in the South African society.

Watson correctly highlighted the use of 'comparative law as a method valuable in legal reform'¹⁸ and 'the prevalence and great importance of legal borrowing'.¹⁹ Kahn-Freund cautioned against a 'risk of rejection'²⁰ on the use of comparative law as a tool of legal change because a use of a comparative method 'requires a knowledge not only of the foreign law, but also of its social, and above all its political, context'.²¹ However, 'his warnings on the comparative method were largely unheeded' in South Africa.²² Watson²³ differed from Kahn-Freund's conservative approach on the use of comparative law and asserted that:

Successful borrowing could be made from a very different legal system, even from one at a much higher level of development and of a different political complexion. What, in my opinion, the law reformer should be after in looking at foreign systems was an *idea* which could be transformed into part of the law of his country. For this a systematic knowledge of the law or political structure of the donor system was not necessary, though a law reformer with such knowledge would be more efficient. Successful borrowing could be achieved even when nothing was known of the political, social or economic context of the foreign law.

Thompson has noted that Watson's view on legal transplants and legal reform in practice '... was applied to the hilt' in effecting Labour law reform in South Africa.²⁴

The development of a 'supervisory harassment' approach to sexual harassment in the workplace will also be examined in order to highlight how the United States has devised creative ways of expanding vicarious liability to

¹⁸ A Watson 'Comparative Law and Legal Change' (1978) 37 *Cambridge LJ* 313 at 318.

¹⁹ Watson *op cit* (n18) 322.

²⁰ O Kahn-Freund 'On the Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1 at 27.

²¹ *Ibid.*

²² C Thompson 'Borrowing and Bending: The Development Of South Africa's Unfair Labour Practice Jurisprudence' (1993) 6 *International Journal of Comparative Labour Law and Industrial Relations* 183 at 184.

²³ A Watson 'Legal Transplants and Law Reform' (1976) 92 *Law Quarterly Review* 79.

²⁴ Thompson *op cit* (n22) 184.

capture the essence of the risk of abuse inherent in the supervisor's delegated power. In the context of supervisory harassment, it will be shown that sexual harassment in the workplace is more disturbing because 'the harasser is using his greater economic authority and resources to secure sexual access to women he otherwise would not have'.²⁵ In the process, the thesis will highlight lessons, which South Africa may learn and borrow from foreign jurisdictions.

Chapter eight will scrutinize the jurisdictional defence in terms of the Compensation for Occupational Injuries and Diseases Act²⁶ ('COIDA') which deals with the substitution of compensation for other legal remedies. In the process, the thesis will highlight that compensation under the COIDA hinges upon whether sexual harassment can be considered to be 'in the course of' and 'arising out of' (which are not synonymous terms) the scope of employment. It will be shown that sexual harassment does not arise out of employment because it is neither a job description nor part of the *modus operandi* of the employment activities to form part of the terms and conditions of employment - even though it has been found to be in the scope of employment. It will be proposed that any attempt to exonerate the employer under the COIDA must be discouraged.

In Chapter nine, criminal remedies will be examined because the harm of sexual harassment contains elements of specific offences recognized as crimes in criminal law, thereby enabling the state to prosecute the perpetrator personally compared to civil remedies where the plaintiff can proceed against either employer or employee. Chapters five, six, seven, and eight are the central focus of the thesis which will examine and describe the scope and application of various remedies for sexual harassment in South African law, in terms of labour law, delict, criminal law and constitutional law, and the

²⁵ RB Siegel 'A Short History of Sexual Harassment' in *Directions in Sexual Harassment Law* CA MacKinnon and RB Siegel (2004) at 19.

²⁶ 130 of 1993.

ways in which they interact. The relationship and overlap between the remedies will be discussed in the light of their advantages, disadvantages and limitations since the remedies are not mutually exclusive; and approach/es, which are best in dealing with sexual harassment, will be proposed.

The thesis will conclude with a summary of the existing law on sexual harassment in the workplace, the shortcomings, and efficacies, making suggestions for the way ahead. Based on the detailed examination of the recent jurisprudence in the Constitutional Court and the High Court (relating to the scope of vicarious liability in general and sexual harassment in particular), a proposal for a more comprehensive approach to vicarious liability in South Africa is made.

Chapter Two - What is Sexual Harassment?

2.1 Outline

This chapter defines sexual harassment and endeavours to give meaning to the term 'sexual harassment' in an effort to contextualize the background to the problem of sexual harassment in the workplace. As a starting point in this chapter, 'it is important that sexual harassment be defined in clear and unambiguous terms so as to enable complainants to know the limits of the protection of the law'.¹ Sexual harassment is 'any offensive conduct related to an employee's gender that a reasonable woman or man should not have to endure'.² It will be discussed that sexual harassment 'is not a new phenomenon but it is receiving much greater attention because of an increasingly diverse workforce and changing attitudes to equal opportunities and to what is acceptable behaviour at work'.³

2.2 The definition of sexual harassment

In South Africa, guidance on the definition of sexual harassment is contained in the 2005 Code as follows:

Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

- whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
- whether the sexual conduct was unwelcome;
- the nature and extent of the sexual conduct; and
- the impact of the sexual conduct on the employee.⁴

¹ S Jagwanth, PJ Schwikkard and B Grant *Women and the Law* (1994) at 33.

² W Petrocelli and BK Repa *Sexual Harassment on the Job* 4ed (1998) at 1.

³ T Stephens and J Hallas *Bullying and Sexual Harassment: A Practical Handbook* (2006) at 2.

⁴ Item 4 2005 Code.

It is worth noting that the above definition has a subjective component in that the impact of harassment on the plaintiff is of relevance. The conduct should amount to impairment of dignity.⁵ This is a new feature in the 2005 Code as there was no mention of impairment of dignity in the 1998 Code.⁶ The 2005 Code thus introduces a potential delictual and human rights element into the definition of sexual harassment in that there is an acknowledgment that sexual harassment is an affront to dignity. The advantage with the 2005 Code is the subjective test for sexual harassment.

The appropriate judicial test for impairment of dignity was outlined in *De Lange v Costa*⁷ where the court assessed the plaintiff's view of detriment from a reasonable person's point of view. It is proposed that the subjective test must be qualified by an objective assessment of sexual harassment as enunciated in the delictual test for impairment of dignity in *De Lange*.⁸ In delict, there is an additional requirement as held in *De Lange*⁹ that one of the essentials to ground a successful action for *iniuria* is an intention on the part of the offender to produce the effect of his conduct. Unlike in delict, the intention of the perpetrator is not part of the test for sexual harassment in the EEA.

The industrial court defined sexual harassment for the first time in a landmark case of *J v M* as follows:

If one applies the dictionary meanings of words, sexual harassment would mean to trouble another continually in the sexual sphere. In the employment relationship the word has a slightly different connotation and is very broadly unwanted sexual attention in the employment environment...In its wider view it is, however, any unwanted sexual behaviour or comment which has a negative effect on the recipient.¹⁰

It is suggested that sexual harassment is an annoyance, which pollutes professional relations in the workplace and makes it difficult for women to do

⁵ Item 5.4 2005 Code.

⁶ 1998 Code of Good Practice on the Handling of Sexual Harassment Cases, which formed part of the LRA.

⁷ 1989 (2) SA 857 (A).

⁸ *Supra* (n7). See also ch 3 on the discussion of the judicial tests to sexual harassment.

⁹ *Supra* (n7).

¹⁰ (1989) 10 ILJ 755 (IC) at 757D-G.

their job. It is clear that inherent in sexual harassment is gender inequality because women are deprived of free and full participation in the labour market.

2.3 Harassment

The Promotion of Equality and Prevention of Unfair Discrimination Act¹¹ (PEPUDA) seeks to eradicate unfair discrimination and harassment, and to promote the achievement of equality. In the context of sexual harassment in the workplace, the PEPUDA does not apply to the employer-employee relationship by virtue of section 5(3) which provides that the PEPUDA 'does not apply to any person to whom and to the extent to which the EEA applies'. The PEPUDA is therefore beyond the scope of this research.

Guidance on the 'harassment' aspect of sexual harassment can be sought from the definition of 'harassment' as contained in section 1 of the Domestic Violence Act¹² which defines 'harassment' to mean:

Engaging in a pattern of conduct that induces the fear of harm to a complainant including-

- a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
- b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;
- c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant.

The above definition highlights the point that conduct will amount to harassment if it is a pattern, persistent in nature, and repeated by the perpetrator. This view is consistent with the Law Commission recommendation that 'an element of repetition be included in a definition of

¹¹ 4 of 2000.

¹² 116 of 1998.

stalking'.¹³ However, section 2 of the Stalking Bill defines stalking to include a single 'protracted' act. It is emphasized that what differentiates a single 'protracted' act from a once off incident is that a single 'protracted' act may be sufficiently serious and comprehensive to constitute a hostile work environment and interfere with the plaintiff's work performance. The EEA is uninformed by external rules which define harassment since the letter and spirit of the EEA is to deter gender discrimination in the workplace and not merely minimize it to single ad hoc incidents of sexual harassment. It must be noted that the employer is enjoined, in terms of section 60(2) of the EEA, to ensure elimination of gender discrimination and any such culpable failure will result in deemed personal liability on the part of the employer in terms of section 60(3) of the EEA.¹⁴

The 1998 Code stated that 'sexual attention becomes sexual harassment if the behaviour is persisted in, although a single incident of harassment can constitute sexual harassment'.¹⁵ The 2005 Code has correctly removed the reference to the 'persistent' nature of sexual harassment and states that 'a single incident of unwelcome sexual conduct may constitute sexual harassment'.¹⁶ It is suggested that the notable omission to the reference of the repeated nature of sexual harassment in the 2005 Code is because in interpreting and applying the EEA, the purpose of anti-discrimination and gender equality must be taken into account. It is for this reason that the 2005 Code recognizes sexual harassment as a form unfair discrimination.¹⁷

Women are therefore not expected to tolerate any level of unfair discrimination. It is suggested that a single act of sexual harassment is

¹³ South African Law Commission Discussion Paper 108 (Project 130) 'Stalking' (2004) at para 1.34. See also Concise Oxford English Dictionary 11ed (2004) which defines sexual harassment as 'the repeated making of unwanted sexual advances or obscene remarks to a person, especially in the workplace'.

¹⁴ See ch 6.2 on the discussion of the remedy of *statutory* vicarious liability in terms of section 60 of the EEA.

¹⁵ Item 3.2(a) 1998 Code.

¹⁶ Item 5.3.3 2005 Code.

¹⁷ Item 3 2005 Code.

sufficient to constitute gender discrimination because women have a right to work in a discriminatory-free environment and every single instance of gender discrimination is unfair discrimination, warrants legal, and employer intervention.

2.4 Why men sexually harass women?

It is important to understand the basis of sexual harassment to understand why men sexually harass women. It is submitted that the harm of sexual harassment is not primarily motivated by sexual desire but is mostly about power struggle between the sexes, mainly macho-power as is clear from the following observation:

Sexual harassment has more to do with power relations than with sexual interest. For many it is a form of oppression, victimization or intimidation based on relationships of power and authority. In some instances abuse of power is linked only to hierarchical rank, but in many countries women's groups, workers' and employers' organizations and government agencies link abuse of power with the traditional status of women in society and observe that when harassed, a person's identity as a sexual being takes precedence over her identity as a worker.¹⁸

The 'disparities in structural power within employment institutions are important, even central, to understanding sexual harassment' and 'a series of social and cultural arrangements have ensured, amongst other things, that women are continually evaluated primarily in terms of their sexuality'.¹⁹ Sexual harassment is causally linked to power-relations in the workplace in that:

Because workplaces are defined by vertical stratification and asymmetrical relations among supervisors and subordinates, individuals can use the power of their positions to extort sexual gratification from their subordinates.²⁰

Manipulation of organizational power is therefore a recipe for sexual harassment in that a supervisor uses his dominant position of authority to

¹⁸ E Date-Bah *Promoting Gender Equality at Work: Turning Vision into Reality for the Twenty-first Century* (1996) at 140.

¹⁹ Jagwanth *et al op cit* (n1) 38-9.

²⁰ AC Levy and MA Paludi *Workplace Sexual Harassment* 2ed (2002) at 72.

alter the conditions of employment of his subordinates. Hierarchical power in the workplace equips men with authority and bargaining power to exploit women in exchange for employment benefits and to impose economic harm for failure to comply with sexual demands. Sexual harassment is also an assertion of patriarchal power in that 'it is a spillover of male dominance from the home to the workplace, from the private to the public sphere'.²¹

Patriarchal attitudes and gender-bias towards women also contribute to men asserting their masculinity through the organizational power in the workplace. This includes exerting authority, which often encompasses mismanagement of duties to put women at a detriment and disadvantaged position compared to their male counterparts. The effect of the employer's inaction in curbing abuse of such organizational power will serve to condone and encourage sexual harassment in the workplace and may result in constructive dismissal.²² It is for this reason that the plaintiff has a remedy of personal liability, *common-law* vicarious liability and *statutory* vicarious liability against the employer who rubberstamps sexual harassment in the workplace.²³

2.5 Same-sex harassment

A conceptual obstacle to the concentration on male as opposed to female harassment is that the statutes are framed in gender-neutral approach, applying to both women and men. It is submitted that sexual harassment is a problem rooted in gender hierarchy and gender inequality in the workplace characterized by male dominance and female subordination whereby 'men who harass use their social, economic, organizational, and physical power to define how gender is to be structured in an organizational setting'.²⁴

²¹ JE Gruber and P Morgan *In the Company of Men: Male Dominance and Sexual Harassment* (2005) at 5.

²² See ch 6.4.2 on the discussion of constructive dismissal.

²³ See chs 5-8 on the discussion of the remedies the plaintiff can bring against the employer.

²⁴ Gruber and Morgan *op cit* (n21) 117.

Furthermore, 'laws based on gender-neutrality tend to hide the realities of gender hierarchies' and are 'incapable of grasping the complex realities in which we live'.²⁵ It is precisely this liberal gender-neutral approach, which devalues gender-based violence and oppression, because it does not explicitly acknowledge and recognize the power discrepancy between the sexes, in the workplace.²⁶

It is submitted that all persons are equal before the law, enjoy equal protection before the law, and are equally entitled to the Constitutional guarantees and liberties. Therefore, the law applies equally to members of the opposite sex and same sex. Conversely, sexual harassment does not only occur between members of the opposite sex but can occur between members of the same-sex. A legal claim to same-sex harassment lies in terms of the Constitution and the EEA, which outlaw unfair discrimination based on gender, sex or sexual orientation.²⁷ Franke correctly states that:

To understand sexual harassment as a regulatory practice that constitutes gendered subjects by inscribing, enforcing, and policing hetero-patriarchal gender norms is to provide a better account of what sexual harassment is and what it does in both different-sex and same-sex cases.²⁸

It is emphasized that same-sex harassment, sexual or not, serves to preserve the status quo in the workplace in that those who do not conform with the gender stereotypes and preconceived gender roles, are punished and discriminated against with a view to putting them in their place. Gregory²⁹ has correctly emphasized that:

Same-sex harassment claims are mostly likely to succeed in two sets of circumstances. First, where the evidence points to a harasser who sexually desires the victim, such as when a gay or lesbian supervisor treats a same-sex subordinate in a sexually charged manner, it is reasonable to infer that the harasser acts in that fashion because of the victim's sex. Second, when it is established that the harassment was motivated by a

²⁵ S Baer 'Dignity or Equality? Responses to Workplace Harassment in European, German, and U.S. Law' in *Directions in Sexual Harassment Law* CA MacKinnon and RB Siegel (2004) at 586.

²⁶ I am grateful to one of my examiners for highlighting this observation.

²⁷ Ss 9(3)-(4) Constitution and 6(3) EEA.

²⁸ KM Franke 'What is Wrong with Sexual Harassment' (1997) 49 *Stan L Rev* 691 at 772.

²⁹ RF Gregory *Unwelcome and Unlawful: Sexual Harassment in the American Workplace* (2004) at 200.

belief that the victim did not conform to gender stereotypes, the courts are likely to attribute the victim's sex as a basis for the harasser's conduct.

It is suggested that same-sex harassment would be actionable because of discriminatory treatment suffered for failure to conform to patriarchal or heterosexual norms, which would not have occurred but for the victim's sexual orientation or gender. Therefore, indignity and inequality are suffered in same-sex harassment because of difference in belonging to a protected class.

2.6 Forms of sexual harassment

It is important that women must be able to recognize and identify sexual harassment when they experience it, hear it or see it. Sexual harassment can take many forms ranging from physical gestures and hints to verbal and non-verbal conduct. The 2005 Code identifies five forms of sexual harassment and lists examples (not a closed list) of prohibited conduct, which would form part of these classifications - that is to say, physical,³⁰ verbal³¹ and non-verbal,³² victimisation³³ and *quid pro quo*.³⁴ The industrial court identified forms of sexual harassment in a landmark case of *J v M*³⁵ as 'conduct which can constitute sexual harassment ranges from innuendo, inappropriate gestures, suggestions or hints or fondling without consent or by force to its worst form, namely rape'.

It is essential that every company must have a sexual harassment policy, which forms part of the conditions of employment, and breach thereof should constitute misconduct warranting dismissal. The employer must also train and educate the staff on the contents of the sexual harassment policy and

³⁰ Item 5.3.1.1 2005 Code.

³¹ Item 5.3.1.2 2005 Code.

³² Item 5.3.1.3 2005 Code.

³³ Item 5.3.2.1 2005 Code.

³⁴ Item 5.3.2.2 2005 Code.

³⁵ *Supra* (n10) at 757D-G.

must give clear examples of prohibited conduct.³⁶ It is submitted that examples of prohibited conduct and interaction with employees during training programmes will help distinguish between what is acceptable and unacceptable behaviour in the workplace.

The 2005 Code also bears a resemblance to the United States sexual harassment law in that it recognizes the *quid pro quo* harassment in terms of which there is an element of reciprocity where sexual favours are made a term of employment in exchange for better employment opportunities.³⁷ For example, *quid pro quo* harassment would be present where a supervisor says to a female subordinate, 'sleep with me, and you will be guaranteed a salary increase and/or a promotion'. Similarly, a *quid pro quo* sexual harassment is present where a supervisor says to his female subordinate, 'if you do not sleep with me, I will withhold employment benefits and opportunities from you'.³⁸

Quid pro quo harassment is rife between the supervisor and his subordinates. Abuse of power in the workplace is aggravated by the fact that employees are at the supervisor's mercy and are economically dependent on their jobs for survival and livelihood.³⁹ It follows therefore that sexual harassment in the workplace context will result in an extreme form of emotional distress and career regression. It is suggested that *quid pro quo* harassment could be prevented by an employer training the supervisors and holding them accountable to a higher than normal ethical standard, because

³⁶ Ss 5.3.1.1-3 2005 Code - examples of verbal, non-verbal and physical conduct that constitute sexual harassment.

³⁷ English law also outlaws a *quid pro quo* type of sexual harassment in section 6(1) of the Sex Discrimination Act of 1975, which makes it illegal for employers to discriminate on grounds of sex in the provision of access to opportunities for promotion, transfer or training in the workplace. See ch 7.4 on the discussion of vicarious liability in the United States. There are two types of sexual harassment in the United States - that is to say, *quid pro quo* and hostile environment harassment.

³⁸ *Quid pro quo* harassment is akin to extortion because the harasser intimidates his victims by promising good career prospects if they comply with his sexual demands, and threatens work sabotage and a tangible employment detriment for non-compliance.

³⁹ See ch 7.4.3 on the discussion of supervisory harassment.

of potential abuse of authority and potential threat to alter the terms of employment when dealing with subordinates. It is recommended that supervisors be held accountable for misconduct because of mismanagement of organizational power. Furthermore, 'the problem of sexual harassment should also be dealt with in staff orientation, education, and training programmes'.⁴⁰

The 2005 Code has now correctly included sexual favouritism under *quid pro quo* and made victimisation a separate form of harassment whereas it was a component of sexual favouritism in the 1998 Code.⁴¹ Sexual favouritism is a sub-category of *quid pro quo* harassment in that the common factor in both is that a tangible employment action will ensue because of compliance or failure to comply with sexual demands. It is suggested that the legislature should have included both sexual favouritism *and* victimisation as part of *quid pro quo* in the 2005 Code. It is argued that victimisation is part of *quid pro quo* in that there is an element of reciprocity and a tangible employment detriment ensues when a competent employee is denied employment opportunities for failure to comply with the sexual demands.

A possible explanation on why the 2005 Code treats victimisation separately is the fact that it is a more serious form of sexual harassment, which encompasses making the workplace unbearable for subordinates who refuse to heed to the supervisor's sexual advances. Another distinguishing feature between 'victimisation' and 'sexual favouritism' is that in victimisation the plaintiff deteriorates in her work progress, work prospects, and work satisfaction. In sexual favouritism, the plaintiff climbs up the corporate ladder and prospers. Put this way, a tangible employment detriment weighs heavier than a tangible employment benefit.

⁴⁰ J Grogan *Workplace Law* 8ed (2005) at 181.

⁴¹ Item 4 1998 Code.

Electronically transmitted messages, with sexual explicit contents, can amount to sexual harassment. In *Singh v Island View Storage Ltd*⁴² the commissioner recognized that sexually explicit messages can create a hostile and uncivilised working environment and thus protected the victims of sexual harassment and upheld the perpetrator's dismissal. The applicant was dismissed for sending a sexually explicit e-mail on the company's 'intranet' to three female colleagues in contravention of the company's email policy, which forbade transmission of sexually explicit messages and pictures. The perpetrator claimed that he had done so as a joke, and that his dismissal was unfair because other employees indulged in similar practices.

The commissioner found that dismissal was justified since the applicant had shown no remorse; on the contrary he had gone out of his way to insult and belittle the complainants during the disciplinary inquiry and constantly referred to them as 'bitches' and used obscene language during the proceedings.⁴³ It is interesting to note that the applicant claimed that he had sent sexually explicit messages and pictures as a joke but such defence was dismissed. In labour law, one can conclude that a defence of a 'joke' is not available to the respondent because the 2005 Code specifically lists sex-related jokes as a form of sexual harassment thereby negating any possibility on the part of the legislature to let 'sex-related jokes' slip the sexual harassment net.⁴⁴ In delict, on the other hand, a defence that the respondent was merely joking is available to rebut the presumption of *animus iniuriandi* and unlawfulness if a reasonable bystander would have regarded the uttered words as a joke.⁴⁵

Following the court judgment in *Singh*,⁴⁶ the 2005 Code officially recognizes electronic transmission of sexual explicit pictures or objects, as a

⁴² [2005] 1 BALR 98 (CCMA).

⁴³ *Supra* (n42) at 99.

⁴⁴ Item 5.3.1.2 2005 Code.

⁴⁵ See *Masch v Leask* 1916 TPD 114 at 116, where the court held that for the defence that the words complained of were uttered in jest without malice and *animus iniuriandi* to succeed, 'the words must be accepted as such by the by-standers' and the defendant must prove that 'it could be taken up in no other light by a reasonable person'.

⁴⁶ *Supra* (n42).

form of sexual harassment. It is recommended that the employer must introduce an email policy forming part of the conditions of employment, which provides that electronic transmission of sexual graphics or content amounts to email policy abuse, and is considered a form of sexual harassment.

2.7 Unwelcome conduct

The 2005 Code defines sexual harassment as 'unwelcome conduct of a sexual nature'⁴⁷ and it does not define what unwelcome conduct is. Guideline can be sought from the now repealed 1998 Code which stated that the 'unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual'.⁴⁸ The European Commission Code of Practice also states:

The essential characteristic of sexual harassment is that it is unwanted by the recipient, that it is for each individual to determine what behaviour is acceptable to them and what they regard as offensive.⁴⁹

The test advanced by both the 2005 Code and European Commission is subjective in that it states that it is for each individual to determine behaviour that is acceptable to them and what they regard as offensive meaning 'one man's meat is obviously another woman's poison'.⁵⁰ However, it is argued that 'this can cause problems where the claimant is particularly sensitive'⁵¹ hence the need to qualify the subjective criterion with an objective dimension. The relevant question that should be asked therefore is: 'would a reasonable

⁴⁷ Item 4 2005 Code.

⁴⁸ Item 3(1) 1998 Code.

⁴⁹ Article 2 European Commission Recommendation and Code of Practice 'Protection of the Dignity of Women and Men at Work' 92/131/EEC (1991).

⁵⁰ www.bartleby.com The New Dictionary of Cultural Literacy 3ed (2002). One man's meat is another man's poison means 'What is good for one person may be bad for another; what is pleasant to one person may be unpleasant to another'.

⁵¹ Stephens and Hallas *op cit* (n3) 12.

person find the behaviour unacceptable by normal standards of behaviour and did that complainant find it caused them upset?’⁵²

The United States Supreme Court in *Meritor Savings Bank v Vinson* drew a distinction between consent and welcomeness and held that:

The fact that sex-related conduct was “voluntary”, in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were “unwelcome”.⁵³

It is highlighted that the correct inquiry is whether the respondent, by her conduct, indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.

It is suggested that unwelcomeness is a broader concept than lack of consent in that as much as lack of consent indicates unwelcomeness, a person can consent to conduct without welcoming it, but one cannot welcome conduct without simultaneously consenting to it. It is observed that what differentiates consent from welcomeness is that consent involves free participation in the activity which is assumed to be according to the participant’s will (welcome). Hence, indication that conduct is ‘unwelcome’ differentiates consent from unwelcomeness. Therefore, there is a continuum between voluntary submission, consent (agreement) and welcomeness (approval).

There is also distinction between ‘consent’ and ‘welcome’ in the wrong of sexual harassment in delict and labour law. The concept of ‘welcomeness’ is unique to the wrong of sexual harassment in labour law since it properly accounts for the disparity of power in the workplace, threat of sabotage and victimisation which usually forces the plaintiff to submit (consent) to sexual advances which are unwanted.

⁵² *Ibid.* See also *De Lange* supra (n7) on the subjective and objective test to an impairment of dignity. See ch 3 on the discussion of the judicial tests to sexual harassment.

⁵³ *Meritor Savings Bank v Vinson* 477 US 57 (1986) at 68.

In *Sadulla v Jules Katz & Co Ltd*⁵⁴ S and his female colleague, K engaged in sex talk and K subsequently alleged sexual harassment and reported the conversation to management. The court held that K and S were both engaged in a conversation, which took place between two willing and consenting adults and which in no way amounted to sexual harassment or sexual aggression, as there was no real aggressor and a real victim.⁵⁵ It is argued that there is a thin line between consent and unwelcomeness in that voluntary participation in the conduct signals welcomeness unless the plaintiff makes it clear through her conduct, and not lead the perpetrator to reasonably believe that his conduct is 'welcome'.

The enquiry of 'unwelcomeness' is a necessity in the context of sexual harassment because there is potential for consensual intimate relationships in the workplace on the one hand; and yet there is gender discrimination and an impairment of dignity where such sexual conduct is unwelcome, on the other hand. It is emphasized that the 2005 Code requirement that the plaintiff indicate 'unwelcomeness' does not unduly restrict the remedy. Instead, it serves to guard against a flood of frivolous actions where conduct was objectively welcome.

One could ask why it be required that the plaintiff declare the unwelcomeness of the conduct when the test of unwelcomeness is objective. It is submitted that a reasonable person in the position of the plaintiff cannot allege unwelcomeness in the absence of her conduct to the contrary. Another reason why it is mandatory for the plaintiff to indicate unwelcomeness is the fact that section 60(1) of the EEA states that 'the alleged conduct must immediately be brought to the attention of the employer'. It is argued that reporting the incident of sexual harassment gives the employer an opportunity to remedy and correct the alleged conduct, failure of which will

⁵⁴ 1997 (18) ILJ 1482 (CCMA).

⁵⁵ *Supra* (n54) at 1488E-F.

result in *statutory* vicarious liability on the part of the employer in terms of section 60(3) of the EEA.

It is suggested that the remedy of *statutory* vicarious liability as contained in section 60 of the EEA will thus not be available for the plaintiff who has chosen not to report the alleged gender discrimination. Reporting sexual harassment therefore gives the employer an opportunity to do something about sexual harassment in the workplace and take steps to protect the plaintiff against sexual harassment. Furthermore, reporting sexual harassment helps build up a strong case for the plaintiff who is faced with the problem that it 'usually occurs without witnesses, behind closed doors, so in court one word stands against the other'.⁵⁶

It is emphasized that if women do not indicate unwelcomeness but instead continue to endure harassment, then the EEA legislative intent of promoting the women's cause against sexual harassment and 'challenging gender and sexual norms in the workplace',⁵⁷ will be in vain. The plaintiff is required to take steps to make it clear that the conduct complained of, is unacceptable.⁵⁸ It is submitted that 'simply ignoring the perpetrator and not responding'⁵⁹ as outlined in the 2005 Code, is not a viable option because suffering in silence creates a wrong impression that the plaintiff tacitly approves of the wrongful conduct. In addition, by suffering in silence the plaintiff is shielding the harasser more than she is endeavouring to protect herself.

⁵⁶ KS Zippel *The Politics of Sexual Harassment: A Comparative Study of the United States, the European Union, and Germany* (2006) at 46.

⁵⁷ *Ibid.*

⁵⁸ Item 5.2.1 2005 Code states that there are different ways in which an employee can evince that conduct is unwelcome, including non-verbal conduct such as walking away or simply ignoring the perpetrator and not responding.

⁵⁹ *Ibid.*

The 2005 Code introduces a new notion, which accounts for the fact that given cultural differences,⁶⁰ it may be difficult for the plaintiff to be assertive, stand up for herself against the perpetrator, and indicate 'unwelcomeness'. There are instances where the inherent abuse of authority involved in sexual harassment makes it difficult for the plaintiff to indicate unwelcomeness because the perpetrator is a person of authority who might be revered. It is recognized that no one is above the law and no perpetrator is untouchable. The 2005 Code makes provision for such potential difficulties where the perpetrator is a person of seniority, by stating that:

Where a complainant has difficulty indicating to the perpetrator that the conduct is unwelcome, such complainant may seek the assistance and intervention of another person such as a coworker, superior, counsellor, human resource official, family member or friend.⁶¹

In a more recent rape case of *S v Zuma*, Dr Friedman's evidence concluded that:

The shock at being awoken from sleep by the man she regarded as a father figure, naked with an erect penis, and his intentions clear, was such a shock, she was trapped, terrified and helpless and was unable to respond in any way other than freeze.⁶²

The court rejected the complainant's evidence that there was a father/daughter relationship between her and the accused.⁶³ This means that there was no father/daughter relationship (abuse of parental authority) which would have made the complainant susceptible to being exploited by the accused. Van der Merwe J further rejected Dr Friedman's evidence and concluded that the complainant did not freeze during sexual intercourse but found that consensual sex took place between the complainant and the accused.⁶⁴

⁶⁰ Cultural differences include notions of respect and reverence. For example, in an African culture women are brought up to be passive and submissive to men. Therefore, standing one's ground and being assertive is perceived as rude and unladylike.

⁶¹ Item 5.2.3 2005 Code.

⁶² 2006 (7) BCLR 790 (W) at para 65.

⁶³ *Supra* (n62) at para 108.

⁶⁴ *Supra* (n62) at para 170.

The court further held that:

After the 'rape' the complainant was in a position to immediately phone the world and to tell them about it but she instead decided to report to her close friends in terms indicating that no rape had taken place.⁶⁵

Van der Merwe J made an important observation that 'the complainant was in a position to immediately phone the world' - meaning nothing stopped or prevented her from complaining about the alleged rape. In the context of sexual harassment, it is clear from the *Zuma*⁶⁶ case that the plaintiff should not feel 'helpless', disempowered or incapacitated to act and women must be assertive and exercise their constitutional and labour right not to be subject to unfair discrimination.⁶⁷ It is submitted that if victims of sexual harassment want the benefit of the protection of the law, they must speak up and effect the change they want to see in the workplace. It is stressed that women can no longer continue playing victims, feel helpless and voiceless thereby enforcing the subordinate status of women in the society. It is suggested that the fight against sexual harassment will be won when women stop viewing themselves as existing in the shadow of men and functioning as a weaker gender.

It is argued that reasonable steps, which indicate unwelcomeness, can be by words or conduct and can include anything from the following:

- a) changing the subject;
- b) walking out of the door;⁶⁸
- c) making it clear to the harasser that his conduct is not a joke but is offensive and unacceptable;
- d) seeking intervention of the third party if the plaintiff fears victimisation or retaliation because of the nature of relationship between the plaintiff and the perpetrator;

⁶⁵ Supra (n62) at para 161.

⁶⁶ Supra (n62).

⁶⁷ S 9 Constitution and s 6(1) EEA.

⁶⁸ In *Reed and Bull Information Systems Ltd v Stedman* (1999) IRLR 299 EAT, the court held that it is not necessary for a woman to make a public fuss to indicate her disapproval; walking out of the room might be sufficient.

- e) writing to the perpetrator advising him to stop the harassing and threatening to take further action if his conduct persists; and
- f) laying a complaint or grievance with the relevant authority.

The requirement of welcomeness means that:

Law requires skills of contention – including standing one's ground – and persuasion – including touching and moving others onto one's ground – abilities that are still widely stigmatized, even demonized in women.⁶⁹

This extract highlights that the law alone will not transform the workplace if women do not make use of the remedies available to assert and protect their rights in the workplace.

2.8 Conduct of a sexual/non-sexual nature

The 2005 Code defines sexual harassment as 'unwelcome conduct of a sexual nature'⁷⁰ thus adopting a view that sexual harassment is motivated by sexual desire and so overlooking the dynamics involved in what drives men to sexually harass women. It is observed that the flaw with the 2005 Code sexual nature paradigm is that it presupposes women as sex objects and overlooks the discriminatory impact of sexual harassment on women as women (gender), as autonomous human beings, as equal workers and as ambitious professionals.

The 2005 Code emphasizes such gender stereotypes by regressing to a point of stating that conduct must be of a sexual nature – thereby instilling the very gender stereotypes which the EEA and the Constitution seeks to eradicate. It is argued that sexual harassment is not merely conduct of a sexual nature but includes disparate gender-based conduct, which sabotages women's progress and advancement in the workplace solely because of their gender. The 2005 Code correctly captures sexual harassment as a form of

⁶⁹ CA MacKinnon *Women's Lives, Men's Laws* (2005) at 107.

⁷⁰ Item 4 2005 Code.

unfair discrimination which is prohibited on grounds of sex and/or gender and/or sexual orientation but narrows the scope of application by defining the test for sexual harassment to only cover 'conduct of a sexual nature'.⁷¹

The fact that harassment was on grounds of gender is one of the factors taken into account once it has been established that conduct was of a sexual nature.⁷² This makes it more demanding to prove sexual harassment where discriminatory conduct was not of a sexual nature but was primarily motivated by gender or sexual orientation, which nevertheless constitutes a form of unfair discrimination in terms of the EEA.⁷³ It is noted that on the face of it, this suggests that any form of discrimination based on sex, gender or sexual orientation (for example, refusing to employ a woman because she is a woman) is capable of being regarded as 'sexual harassment'. This surely is not the legislative intention because not every form of discrimination based on gender amounts to 'sexual harassment'. It is emphasized that sexual harassment is a specific form of discriminatory conduct amounting to unfair discrimination which is outlawed in terms of section 6(3) of the EEA, and defined as a guideline in item 4 of the 2005 Code. The aim of the EEA is to outlaw gender discrimination and remove gender stereotypes instilled by sexual harassment.

It is submitted that the plaintiff can still succeed by invoking item 2.1 of the 2005 Code which reiterates that it is instructive only as a 'guide'⁷⁴ and does not give rise to enforceable legal rights and obligations. Furthermore, the Code merely contains 'instructive guidelines to be followed and not binding in law' and it follows that the employer 'cannot be penalised for its failure to implement these recommendations'.⁷⁵ Therefore, the 2005 Code does not take

⁷¹ Items 3-4 2005 Code.

⁷² *Ibid.*

⁷³ Ss 6(1) and 6(3) EEA.

⁷⁴ See *Moropane v Gilbeys Distillers and Vintners (Pty) Ltd & another* [1997] 10 BLLR 1320 (LC) at 1325, where Landman AJ held that the Code is relevant as a guide 'to those who apply and supervise industrial justice' and does not give rise to legal rights and obligations.

⁷⁵ *Ntsabo v Real Security CC* [2004] 1 BLLR 58 (LC) at 95.

away rights and recourse the plaintiff has in terms of section 60 of the EEA. However, compliance with the 2005 Code is relevant as evidence when establishing unfair discrimination in terms of the EEA and in determining the extent to which the employer discharged its duty of care and obligations in accordance with the provisions of section 60(2) of the EEA. It is highlighted that the common feature between the 2005 Code and United Kingdom the Code of Practice on Sex Discrimination in Employment⁷⁶ is that:

The Code, which is not legally binding but which can be introduced as evidence in all sex discrimination cases, provides that employees should be advised to use the internal procedures where appropriate, but that this is without prejudice to the individual's rights to apply to an industrial tribunal.⁷⁷

It emphasized that the 2005 Code's justification for what appears to be an excessively narrow interpretation of the term 'sexual' in item 4, is questionable and renders it in conflict with section 6(3) of the EEA and thus since the 2005 Code is relevant as only a 'guide' - *ultra vires*. Caution must thus be exercised against an excessively narrow interpretation of the term 'sexual' in the context of item 4 of the 2005 Code, which limits harassment to conduct motivated exclusively by sexual desire. It is submitted that sexual desire is not a requirement to ground a sexual harassment claim as it was correctly held by Scalia J in *Oncale v Sundowner Offshore Services, Inc* that 'harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex'.⁷⁸

An instructive definition of sexual harassment is in the European Commission Code of Practice, which defines sexual harassment as:

⁷⁶ Issued in 1985 by the Equal Opportunities Commission (EOC) in terms of section 58(A)(1) of the Sex Discrimination Act 1975.

⁷⁷ United Nations Economic Commission for Europe 'Report on Sexual Harassment in the Workplace in EU Member States' (June 2004) at 38. See also item 2.1 of the 2005 Code which states the Code is instructive as a 'guide'. See also item 7.3 of the 2005 Code on the evidentiary relevance of the pro-active steps taken by the employer. - which states that the adoption of a sexual harassment policy and the communication of the contents of the policy to employees, should, amongst other factors, be taken into consideration in determining whether the employer has discharged its obligations in accordance with the provisions of section 60(2) of the Employment Equity Act (EEA).

⁷⁸ 523 US 75 (1998) at 80.

Unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work. This can include unwelcome physical, verbal or non-verbal conduct...⁷⁹

It is interesting to note that the above definition is different to the South African definition of sexual harassment as contained in the 2005 Code. The European Commission Code of Practice not only acknowledges conduct of a sexual nature as constituting sexual harassment, but also includes 'other conduct based on sex affecting the dignity of women and men at work'. The 2005 Code only defines sexual harassment as unwelcome conduct of a sexual nature and does not refer to other forms of conduct, which are not of a sexual nature.⁸⁰

It is submitted that conduct of a 'non-sexual' nature includes conduct which affects women as workers and human beings (not as merely sexual beings), and which is an obstacle to their career progress and economic prosperity. Sexual harassment includes gender-based conduct, which denigrates the worker based on his or her gender and includes the following coercive behaviour:

- Over or covert behaviour used to control, influence or affect a person's job, career or status;
- Explicit/implicit promise of career advancement in exchange of sexual favours;
- Explicit/implicit promise of recruitment in exchange of sexual favours;
- Threatening of dismissal if sexual favours are not granted; and
- Making work difficult if sexual favours are not granted.⁸¹

The 2005 Code acknowledges sexual harassment as a form of gender discrimination yet it does not define it to include other forms of 'non-sexual' conduct based on gender, which violate the rights of an employee.⁸² The disadvantage of the 2005 Code sexual nature paradigm is that it is 'under inclusive and too narrow in its attempts to weed out sexual harassment' in the

⁷⁹ Article 2 European Commission Recommendation and Code of Practice above (n43).

⁸⁰ Item 4 2005 Code.

⁸¹ D Chappell and V Di Martino *Violence at Work* 3ed (2006) at 18.

⁸² Item 4 2005 Code.

workplace.⁸³ Other writers also support the European Commission Code of Practice:

The strength of this definition lies in the manner in which sexual harassment is conceptualised...This de-emphasises the supposedly sexual aspect of harassment, to concentrate on the question of power which MacKinnon and others have argued is at the heart of sexual harassment. It also allows those acts of harassment which are not explicitly sexual (such as sexist jokes and comments) and which are the cornerstone of 'hostile environment' harassment to be covered more explicitly.⁸⁴

Schultz rightly opines a reconceptualization of sexual harassment to recognize the 'non-sexual' forms of sexual harassment which includes work sabotage which has the 'function of denigrating women's competence for the purpose of keeping them away from male-dominated jobs or incorporating them as inferior, less capable workers'.⁸⁵ In order to conceptualize the harm of sexual harassment properly, it is proposed that its definition must include 'non-sexual' forms of harassment, which are gender related, but not of a sexual nature. Sexual harassment is still an appropriate legal term even though it includes 'non-sexual' forms of conduct which entail abuse of masculine power – sexual means 'gender' as interchangeably used with 'sex' to describe male and female sexes.

2.9 Conclusion

It is concluded that sexual harassment can be defined as unwelcome conduct, which offends a reasonable person in the position of the victim.⁸⁶ It essentially involves two sides of a coin amounting to an impairment of dignity, self-esteem, self-worth, respect, *ubuntu*, individual autonomy and equality from a positive aspect; and freedom from insult, degrading treatment, disrespect, abuse of trust and unfair discrimination from a negative aspect. The 2005

⁸³ AB Cochran *Sexual Harassment and the Law: The Mechelle Vinson Case* (2004) at 199.

⁸⁴ Jagwanth *et al op cit* (n1) 50.

⁸⁵ S Estreicher *Sexual Harassment in the Workplace – Proceedings of New York University 51st Annual Conference on Labor* (2001) at 92.

⁸⁶ See ch 3.5 on the discussion of the reasonable person in the position of the victim test.

Code, albeit relevant as only a 'guide', is to be applauded for following the European Commission Code of Practice definition of sexual harassment, which captures the essential harm of sexual harassment as constituting an affront to dignity of workers in the workplace, which was not mentioned in the 1998 Code. The 2005 Code has not only broadened the definition to capture the essence of the harm of sexual harassment as constituting an affront to dignity of women but has stated that it constitutes 'a barrier to equity' in the workplace.⁸⁷ However, the *actio iniuriarum* achieves the general civil law protection of dignity and the 2005 Code relates to the elimination of sexual harassment in the workplace (employment equity).

'Equity' is an important concept in the 2005 Code, which can be understood in the light of the preamble of the EEA, which is to achieve true democracy in the workplace by eliminating all traces of discrimination, which are a barrier to equality and to economic advancement of workers. Le Roux, Orleyn and Rycroft have stated that the new requirement that 'sexual harassment constitutes a barrier to equity in the workplace' could allow employers to escape liability even if the victim has suffered no tangible job detriment.⁸⁸

It is emphasized that the statement of 'barrier to equity' does not burden the victim by requiring her to evince a tangible job detriment. This is merely a blanket statement of what the harm of sexual harassment encompasses in the employment context and is in line with the spirit of the EEA, which outlaws any conduct, which causes disharmony in the workplace and is contrary to equal participation of all in the labour market. 'Barrier to equity' does not imply a tangible job detriment to the plaintiff and perhaps Le Roux, Rycroft and Orleyn interpret it rather restrictively in the employment context. The 2005 Code must not be interpreted narrowly – but rather in the

⁸⁷ Item 4 2005 Code.

⁸⁸ R le Roux, T Orleyn and A Rycroft *Sexual Harassment in the Workplace: Law, Policies and Processes* (2005) at 38.

light of the spirit of the EEA which is to eliminate unfair discrimination, promote productivity and economic progress of the labour force.⁸⁹

The time has come for women to break their silence and speak out against gender discrimination, and signal 'that they no longer have to put up with it, because sexual harassment is not just a nuisance but also an injustice and illegal'.⁹⁰ The fight against sexual harassment cannot be won if women are not pro-active in fighting for their rightful place in the workplace and asserting their right to a sexual harassment free environment. The 2005 Code has defined the scope of sexual harassment to enable women to identify the experience and wrong of sexual harassment.

⁸⁹ See the preamble to the EEA.

⁹⁰ Zippel *op cit* (56) 218.

Chapter Three – Test for Sexual Harassment – A Subjective or Objective Approach

3.1 Outline

In applying the test for sexual harassment, the issue before the courts is: from whose perception of the nature of sexual harassment is decisive? This chapter explores various tests to sexual harassment with a view to proposing a judicial test that is gender neutral, objectively determined, in harmony with the precepts of the Constitution and gives effect to the letter and spirit of the EEA.

3.2 The reasonable man test

This section will examine the application of the reasonable man test as a standard used to assess sexual harassment and will highlight how the reasonable man test is not adequate to successfully provide redress to victims of sexual harassment. Bernstein correctly rejects the male-central approach implicit in the reasonable man test and maintains 'a reasonable person standard implicitly denies that women and men are likely to react differently to sexual invitations, innuendo, teasing, or displays in the workplace'.¹

In *Baskerville v Culligan International Co*² the court applied a reasonable man test and drew a line between severe or pervasive conduct, which is deeply offensive and sexually harassing that causes discriminatory terms or

¹ A Bernstein 'Treating Sexual Harassment with Respect' (1997) 111 *Harv L Rev* 445 at 465. A male-central approach of the law to the concept of reasonableness in the case of the defence of private defence, especially in domestic abuse cases was adopted in *S v Engelbrecht* 2005 (2) SACR 41 (W) at para 327, where a battered wife killed her husband 'in self-defence' - Satchwell J held that where an accused relies on the justification of 'self-defence' for killing an abusive spouse, the court must assess whether the accused acted lawfully from an objective point by deciding what 'the fictitious reasonable man, in the position of the accused and in the light of all the circumstances would have done'.

² 50 F 3d 428 (7th Cir 1995).

conditions of employment and, on the other hand, conduct which is vulgar or mildly offensive tinged with sexual innuendo. The court held that that the concept of sexual harassment was designed to protect working women from the kind of male attentions that can make the workplace hellish for women and was not designed to purge the workplace of vulgarity.³

The court then found that 'Mr Hall, whatever his qualities as a sales manager, is not a man of refinement; but neither is he a sexual harasser'.⁴ In reaching this conclusion, the court reasoned that he never touched the plaintiff or invited her to have sex with him, or to go out on a date with him. Furthermore, the court held that he never said anything to her that could not be repeated on prime-time television.⁵

It is submitted that the court did not appreciate the sensitivity of sexual harassment in poisoning the workplace for women workers. Instead, the court implied that a certain degree of sexual harassment must be tolerated and condoned because it was of the view that the concept of sexual harassment was not meant to clean up the workplace of all the obscenity and vulgarity. Viewed this way, the court considered sexual harassment to be an inherent risk in the workplace, which should be assumed by women to a certain extent. The court thus failed to apply its mind to the principles of ethics, dignity, and gender equality, which should be upheld in the workplace.

In *Rabidue v Osceola Refining Co*⁶ the female plaintiff complained of a work environment that was a den of erotica and had pictures of nude and semi-nude women on calendars, on desks and on wall papers. The male co-workers also used crude language evidencing anti-female sentiments, and routinely referred to women as 'whores, cunt, pussy, and tits'.⁷ Applying the reasonable man test, the court held that the male co-worker's obscenities

³ Supra (n2) at 430.

⁴ Supra (n2) at 431.

⁵ *Ibid.*

⁶ 805 F 2d 611 (6th Cir 1986).

⁷ Supra (n6) at 624.

although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees and as such did not interfere with her work performance.⁸ The court held that a plaintiff may not prevail in the absence of conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances.⁹ In justifying its conclusion, the court held that Title VII was not meant to bring a magical transformation in the social mores of American workers.¹⁰

It is observed that the court was thus of a view that sexual harassment is tolerable to the extent to which it does not affect work performance and psychological well-being of the plaintiff. The court's message is that the plaintiff is expected to endure sexual harassment until it is so grave that it affects her health and results in poor work performance. The court overlooked the fact that sexual harassment is forbidden behaviour, which is not supposed to happen in the workplace. It is emphasized that no person enters the workplace either to be sexually exploited or to have her rights unjustly eroded. It should be enough that sexual harassment affects the productivity of the employee to the extent that it interferes with her ability to properly execute her duties.

The reasonable man test has thus served to trivialise the harm of sexual harassment on women by rendering discriminatory and pervasive behaviour as acceptable within professional relations at work and has failed to account for the impact of sexual harassment from a viewpoint of the victim. Another injustice evident in applying a reasonable man test is *Caleshu v Merrill Lynch, Pierce, Fenner & Smith*.¹¹ The complainant claimed that over five-month period her superior forcibly french-kissed her on two occasions and touched her

⁸ Supra (n6) at 622.

⁹ Supra (n6) at 620.

¹⁰ Supra (6) at 626.

¹¹ 737 F Supp 1070 (ED Mo 1990).

thigh on two occasions while outside office, and told her off-colour jokes. Despite the fact that some of the acts of sexual harassment constituted indecent assault, the court dismissed the complainant's claim for sexual harassment on grounds that the conduct complained of was 'trivial'.¹²

In *Scott v Sears, Roebuck & Co*¹³ the court also failed to address the shortcomings of a reasonable man test and adopt a reasonable woman test, as suggested by the dissenting judgment in *Rabidue* - that is to say, 'the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant'.¹⁴ In this case, a female mechanic alleged that she was harassed by her co-workers through repeated propositions, winking at her, sexual innuendo, offers of massage, and slaps on her buttocks. She was asked 'what will I get for it' when she asked her male co-worker for advice and one of her male co-workers also told her that she must 'moan and groan' while having sex.

The court held that the sexual harassment that the plaintiff was subjected to was not so 'severe or debilitating' to poison the plaintiff's working conditions.¹⁵ It submitted that South African law is more sensitive to the plaintiff than in the United States. In South African law, there is no stringent requirement that the plaintiff must first establish that the conduct complained of was 'sufficiently severe or pervasive'.¹⁶ This requirement has often been construed by the United States courts to mean that for sexual harassment to be actionable, it must be so grave as to make it impossible for the plaintiff to resume with her normal duties. It is argued that given the high unemployment rate in South Africa, women are left with no choice but to

¹² *Supra* (n11) at 1083.

¹³ 798 F 2d 210 (7th Cir 1986).

¹⁴ *Supra* (n6) at 626. The dissenting judgment envisioned that the perspective of a reasonable woman properly conceptualizes the harm of sexual harassment in that it accounts for sociological differences between males and females and their different reactions to similar situations.

¹⁵ *Supra* (n13) at 213-4.

¹⁶ *Harris v Forklift Systems Inc* 510 US 17 (1993) at 21.

continue working albeit under difficult work conditions. It is stressed that it would be double punishment to expect women to suffer gender discrimination and at the same time not offer equal protection of the law until the plaintiff has put up with sexual harassment to a certain degree of severity.

In *Staton v Maires County*¹⁷ the charge was for rape, which is the most gruesome form of sexual harassment. The court dismissed her claim for sexual harassment and concluded that she might have invited sexual intercourse. The court reasoned that although the act of intercourse was shown to have affected her psychological well-being, she was able to work regular shifts after the incident, and there was no testimony to the effect that she was distressed or unable to perform her duties. It is argued that the court did not give effect to the true intention of the Congress as evinced in Title VII, which outlaws sexual harassment as a form of gender discrimination.¹⁸

The court also did not give effect to the grammatical meaning of the EEOC guidelines which state that the conduct must have the effect of 'unreasonably interfering with the work performance'¹⁹ as opposed to rendering the individual unable to do her work as the court concluded. The fact that the plaintiff continued to work regular shifts, on whose livelihood she depended, does not mean that it was not difficult for the plaintiff to perform her work. The court found that the plaintiff suffered psychologically and yet still concluded that she might have invited sexual intercourse instead of establishing whether she 'welcomed' it. It is argued that the plaintiff could have brought a separate criminal charge of rape.

It is submitted that the problem with the reasonable man test which makes it unacceptable is that it tends to be male biased and is not sensitive to what women find offensive which may not be offensive to men. The use of the reasonable man standard to evaluate sexual harassment claims:

¹⁷ 868 F 2d 996 (8th Cir 1989).

¹⁸ S 703(a)(1) of Title VII of the Civil Rights Act 1964 42 USC § 2000e-2.

¹⁹ 'Guidelines on Discrimination Because of Sex' 29 CFR § 1604.11.

can validate male-perpetrated norms and that risk is aggravated by the fact that the judges who interpret and enforce sexual harassment laws are mostly men who may themselves be guilty of bias, or possibly even harassment.²⁰

It is established that the reasonable man test is thus a narrow approach, which is contrary to the *audi alteram partem*²¹ maxim, which looks at the reaction of both males and females instead of assuming on behalf of women that the wrongful conduct is unobjectionable. The reasonable man test should be rejected because it serves to reinforce the status quo of gender discrimination without addressing the core issues underlying the wrong of sexual harassment.

Problems with applying a reasonable man test are evident in the outcome of the decisions because the courts apply a male standard in judging whether conduct of sexual harassment was offensive. The reasonable man test therefore 'fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men'; and enables the defendants and courts to 'sustain ingrained notions of reasonable behaviour fashioned by the offenders, in this case, men'.²²

3.3 The reasonable woman test

This section examines 'the reasonable woman' test, will explore its advantages, and will conclude with reasons why it must be rejected. It is submitted that it will be impossible to comprehend the nature of harm of sexual harassment on women if the courts do not adopt an objective test, which looks at a reasonable woman.

²⁰ DS Brenneman 'From a Woman's Point of View: The Use of a Reasonable Woman Standard in Sexual Harassment Cases' (1992) 60 *U Cin L Rev* 1281 at 1306.

²¹ *Audi alteram partem* means 'hear the other side.' Available at <http://www.lib.uct.ac.za/law/Info/latin.htm#D> (accessed 23 March 2006).

²² *Rabidue supra* (n6) at 626.

In *Ellison v Brady*²³ the plaintiff received 'bizarre' love letters from her male co-worker. The court adopted a reasonable woman test and held that Ellison's reaction was not idiosyncratic or hyper-sensitive. The court found that a reasonable woman could have had a similar reaction and would have found defendant's conduct sufficiently severe or pervasive to alter conditions of employment and create abusive working environment.²⁴ The court justified its reasoning as follows:

We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women. The reasonable woman standard does not establish a higher level of protection for women than men... Instead, a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men. By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women will have to run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living.²⁵

The court's reasoning is compatible with a reasonable person in the position of the victim test discussed in chapter three because it includes an emphasis on the views and experiences of women. However, a gender-conscious test is not compatible with a gender-blind examination because it involves paying special attention to 'gender' as opposed to an objective assessment of the circumstances. The court then sent out a strong message in summing up its reasoning and held as follows:

We hope that over time both men and women will learn what conduct offends reasonable members of the other sex. When employers and employees internalize the standard of workplace conduct we establish today, the current gap in perception between the sexes will be bridged.²⁶

It is argued that the implications of a reasonable woman test are that the law recognizes the harm and exploitation of women in the workplace and in the society. The result is to take an objective viewpoint of a reasonable woman, and combine it with the victim's subjective viewpoint and in so doing guard against the flood of litigation, which would ensue, should a

²³ 924 F 2d 872 (9th Cir 1991).

²⁴ *Supra* (n23) at 880.

²⁵ *Supra* (n23) at 879-80.

²⁶ *Supra* (n23) at 881.

solely subjective test be adopted. It is observed that the advantage in applying the reasonable woman test thus gets to embrace and appreciate the experience of women as evident in cases of domestic violence and battered woman syndrome. The rationale for the reasonable woman test is that it accounts for and protects the vulnerable status of women in our society and seeks to bring reform to the status quo of ignoring the extent to which women suffer the harm of sexual harassment.

Brenneman favours the reasonable woman test to determine whether the conduct complained of has risen to such a level to constitute actionable harassment because it 'discards the male biased definition of acceptable behaviour and substitutes a viewpoint that acknowledges the effects of sexual harassment on women'.²⁷ Nel similarly endorses the reasonable woman test because it 'would not only result in a fair evaluation of the conduct, but would also promote an understanding and awareness of what conduct offends reasonable members of the opposite sex'.²⁸

It is submitted that the reasonable woman test looks at harm from a viewpoint of a woman and puts into perspective what that woman felt and went through when she experienced sexual harassment using a feminist approach of a reasonable woman test as a yardstick. This is the case because a reasonable woman test regards sexual harassment as follows:

- a) as gender discrimination;
- b) as an injury to women as human beings;
- c) as an affront to dignity;
- d) as an injury to women as workers with equal participation in the labour market as men; and

²⁷ Brenneman *op cit* (n20) 1296.

²⁸ SS Nel 'A Comparative Review of the Law Regarding Sexual Harassment in the Workplace' (1993) 26 *De Jure* 244 at 258.

- e) as an injury to women as members of a female gender with equal rights, power and job opportunities as men.

It is emphasized that the same can be said about same-sex harassment between gays. Same-sex harassment can be inflicted to perpetuate gender stereotypes and put gay men or suspected gay men in their place when viewed as non-conformists to the traditional male norms. It is argued that in same-sex harassment a person is discriminated against not because of gender, but because of his sexual orientation which is viewed as failure to conform to gender norms (for instance, gender stereotype statements like calling a gay person 'a sissy' or 'a faggot'). The problem with the reasonable woman test is that it fails to account for same-sex harassment and is inflexible in that it assumes that men are not sexually harassed. Viewed this way, the test has the 'potential to further both paternalism and essentialism'.²⁹ The shortcoming of the reasonable woman test is that it leaves open the question of what test would be used in the woman on man harassment or same-sex harassment involving males because in such circumstances, a reasonable woman test would be inappropriate.

It is submitted that the extent of harm is the same and gender non-discrimination has the same protection of law between gays as when sexual harassment occurs between members of the opposite sex.³⁰ It is concluded that the reasonable woman standard must be rejected because:

[I]t appears to act as a mere panacea, lulling advocates for sexual harassment victims into believing that courts have made a significant change in the standard when it is likely to have little effect on the outcomes of real cases.³¹

²⁹ TM Beiner *Gender Myths v Working Realities: Using Social Science to Reformulate Sexual Harassment Law* (2005) at 203.

³⁰ Item 5.1.2 2005 Code and s 6(1) EEA.

³¹ Beiner *op cit* (n29) 203.

3.4 The reasonable person with the same fundamental characteristics test

This section will examine the 'reasonable person with the same fundamental characteristics' test, used in the United States to assess whether conduct is severe or pervasive enough to found sexual harassment. In *Fuller v City of Oakland*³² the court suggested a standard, which determines hostility and pervasiveness of sexual harassment from a perspective of a 'reasonable person with the same fundamental characteristics' as the victim. The court viewed this test as a middle ground between a reasonable man test and a reasonable woman test.

The problem with the 'reasonable person with the same fundamental characteristics' test is defining the ambit of those fundamental characteristics to be taken into account. It is emphasized that the fundamental characteristics, which can be taken into account, are infinite and largely subjective such as a victim's experiences, upbringing, education, race, religion, socialization, and conservative attitudes. It is submitted that a reasonable person with the same fundamental characteristics is the victim herself because her reaction is assessed from her viewpoint because it takes the victim as the harasser found her. This test is not instructive to South Africa and must be rejected.

3.5 The reasonable person in the position of the victim test

This section advocates the use of the 'reasonable person in the position of the victim' test. The reasonable woman test can be viewed as reverse discrimination similarly that a reasonable man test is rejected. The reasonable woman test tends to 'gender' women and entrenches gender stereotypes, which the EEA seeks to eradicate. It is for this reason therefore that it is proposed that South Africa should adopt a viewpoint of a 'reasonable person in the position of the victim' when dealing with sexual harassment. It is

³² 47 F 3d 1522 (9th Cir 1995) at 1527.

argued that gender discrimination must be actionable, as long sexual harassment would have placed a reasonable person in the position of the victim in an objectively discriminatory employment terms and conditions.

In *Oncale v Sundowner Offshore Services Inc*,³³ the court established that an employer may be liable for harassment by a supervisor or co-worker who is the same gender as the target of the harassment, provided the plaintiff was discriminated against on grounds of gender. The legal standards governing same-sex claims, the court held, are identical to those used to evaluate a claim for the opposite sex harassment. Title VII is violated when the conduct 'is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment'.³⁴ Justice Scalia reiterated that 'the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances'.³⁵

The reasonable person in the position of the victim is a subjective and objective test. It is subjective to the extent that if the victim does not subjectively perceive the working environment to be detrimental, the plaintiff has not suffered gender discrimination, and there is no EEA violation. The subjective component is there to sympathise with the victim by assessing the harm of sexual harassment from the victim's subjective viewpoint. The objective component seeks to curb a flood of litigation by the faint-hearted victims. The subjective and objective components therefore balance each other to ensure an equitable result. Objectivity assesses the victim's reaction using a standard of a reasonable person - whether objectionable conduct created an objectively abusive environment.

The essence of EEA is that it forbids discriminatory conduct on grounds of sex, gender or sexual orientation which is an affront to dignity and

³³ 118 S Ct 998 (1998).

³⁴ *Supra* (n33) at 1001 citing *Harris v Forklift Systems Inc* 510 US 17 (1993) at 21.

³⁵ *Supra* (n33) at 1003 citing *Harris supra* (n34) at 23.

gender equality in the workplace and objectively alters the terms and conditions of employment of the plaintiff. The 2005 Code similarly recognizes same-sex harassment as a form of discrimination on grounds of sex, gender and sexual orientation.³⁶ The reasonable person in the position of the victim test is thus a fair test since same-sex harassment is now recognized in our law. The reasonable woman test falls short of covering same-sex harassment as it presupposes sexual harassment only takes place between members of the opposite sex.

Le Roux, Rycroft and Orleyn opine that a 'reasonable victim' standard is a more appropriate standard since both women and men can be victims of sexual harassment.³⁷ They reject the reasonable person test as complex and ask 'whether can the same reactions be expected of a woman in a rural setting as one in an urban setting?' The same question can be asked of the 'reasonable victim' test whether the same reactions can be expected of a rural woman (victim) compared to an urban westernised woman (victim). It is observed that the reasonable victim test presupposes that the plaintiff is a 'victim' before a finding whether sexual harassment is indeed actionable and it defeats the whole purpose of introducing objective criteria.

*Oncale*³⁸ reasserted that the 'reasonable person' determination requires careful consideration of the social context in which particular behaviour occurs and is experienced by the individual who is the target of the alleged harassment. This means that the reasonable person in the position of the victim test takes into account the context of harassment, and the circumstances surrounding the target of harassment. 'In the position of the victim' is relevant in determining whether sexual harassment was severe

³⁶ Item 5.1.2 2005 Code.

³⁷ R le Roux, T Orleyn and A Rycroft *Sexual Harassment in the Workplace: Law, Policies and Processes* (2005) at 31-2. See also C Garbers 'Sexual Harassment as Sex Discrimination: Different Approaches, Persistent Problems' (2002) 14 SA Merc LJ 371 at 395 where the writer supports the use of the 'reasonable victim' test and suggests that harassment must be looked at from the perspective of the victim.

³⁸ *Oncale* supra (n33) at 1003.

enough to ground an actionable claim, to ensure that the objective standard of a reasonable person is not applied in vacuum but from the perspective of a 'reasonable person's reaction to a similar environment under similar or like circumstances'.³⁹

The reasonable person in the position of the victim is not the same as a reasonable person with the same fundamental characteristics test. A reasonable person in the position of the victim signifies intent to take into account surrounding external circumstances to the victim compared to characteristics which are internal to the victim and which are therefore subjective. Characteristics are innate traits and qualities of the victim, which are subjective, and therefore the reasonable person with the same fundamental characteristics as the victim is a biased test.⁴⁰ It is submitted that the victim's hypersensitivity and attitude to men based on her experience are characteristics.

It is submitted that the courts will define the 'position of the victim' on a case-by-case basis by balancing the subjective and objective aspects of the legal claim. In so doing, the court will apply a purposive approach to uphold the principles of dignity and equity entrenched in the EEA and the Constitution. The subjective aspect accounts for the effect of sexual harassment from the victim's viewpoint. The objective aspect assesses the effect of sexual harassment from the perspective of a reasonable person in the

³⁹ *Highlander v KFC National Management Co* 805 F2d 644 (6th Cir 1986) at 650.

⁴⁰ See *Nichols v Frank* 42 F 3d 503 (9th Cir 1994) at 512, where the court applied the reasonable person with the same fundamental characteristics as the plaintiff and held:

Under this approach also, it is proper for the fact-finder to consider the fundamental or immutable characteristics of the individual bringing the charge. But here, in addition, the fact-finder may consider other individual traits or characteristics known to the accused that may make the victim especially or uniquely susceptible to *quid pro quo* sexual harassment. A defendant may be liable under the subjective test if he intentionally takes advantage of some particular fear or weakness that afflicts the accuser. By the same token, characteristics of and information about the accused which are known to the accuser may become part of the mix. A showing that either the subjective or objective standard is met is sufficient to support the imposition of liability.

position of the victim. It is emphasized that in applying 'a reasonable person in the position of the victim' test, the judicial enquiry will include an objective assessment of the following factors:

- a) time and place where sexual harassment occurred;
- b) whether it unreasonably interfered with the plaintiff's work performance;
- c) impairment of dignity;
- d) how sexual harassment impaired the plaintiff's health and psychological welfare;
- e) the power/trust relationship between the victim and the offender;
- f) how the words were uttered taking into account the gestures of the perpetrator; and
- g) the objective severity of harassment.

The reasonable person in the position of the victim therefore means a reasonable person would have believed she was subjected to sexual harassment, and would have found, as the plaintiff did, that it had altered her condition of employment. This standard is also appropriate in cases where a sex-worker, whose trade involves inviting sexual advances, is sexually harassed. This is so where a sex-worker is 'off-duty' and a man nevertheless takes advantage and forces himself onto the sex-worker. The test would be whether a reasonable person in the position of the victim (sex-worker) would have believed that she was violated and subjected to sexual harassment. This test is therefore appropriate because of its flexibility and ability to be accommodated to different set of facts and circumstances.

It is established that the reasonable person in the position of the victim test is fair, gender neutral and is neither male nor female specific but assesses conduct from a reasonable worker's viewpoint who finds herself/himself sexually harassed at work. This means that even in same-sex sexual

harassment, a victim will be able to use a 'reasonable person in the position of the victim' test in that it is not gender specific and avails itself to all victims of sexual harassment. It is concluded that this test fits well within the feminist cause for the elimination of all barriers faced by women in the workplace and treating women with equal humanity and respect. The essence of the feminist cause is the elimination of second-class status often accorded to women in the workplace, and the restoration of equality and dignity often impaired by the wrong of sexual harassment. The gender-neutral test is a compromise in that neither uses the benchmark of a reasonable man nor of a reasonable woman, but instead treats both genders on par. In any case, the reasonable woman test was advanced as an alternative to the male-biased and discriminatory 'reasonable man' test.

The problem with adopting the reasonable woman test as expounded by feminist theorists is that it reinforces the perception that women are victims and sorry-cases who need special sympathy and yet all persons are equal before the law. As much as the use of a gender-neutral test does not recognize the gender hierarchy and power imbalance inherent in the workplace, it is nevertheless compatible with the values and fundamental rights entrenched in the Constitution by de-emphasizing and neutralizing gender-based prejudice. In conclusion, the disadvantage with the reasonable woman test/reasonable man test is that:

- a) It emphasizes femininity/masculinity;
- b) It advances one gender at the expense of the other; and
- c) It is contrary to the constitutional principle against gender discrimination, which promotes equality.

3.6 Conclusion

In South Africa, a subjective test⁴¹ is applied in certain cases (labour law) but not in delict where the *De Lange v Costa*⁴² objective test of dignity applies. In *J v M*⁴³ the court adopted a subjective test using the viewpoint of the victim when it defined sexual harassment as 'unwanted sexual behaviour or comment, which has a negative effect on the recipient'. In *Reddy v University of Natal*⁴⁴ the court also applied a subjective test when it defined sexual harassment as 'any unwanted sexual behaviour or comment, which has a negative effect on the recipient'. It is concluded that these are not true subjective tests because the negative effect on the recipient could be considered objectively by the courts. It is suggested that the decisive factor is therefore not the response of the recipient, but rather a response of a reasonable person in his/her position.

The use of an entirely subjective test may lead to a potential floodgate of litigation and is capped in delict under the objectively assessed impairment of dignity. Guidance can be obtained from delict where a subjective impairment of dignity must be satisfied first, and then an objective assessment ensues. The conduct complained of must objectively be insulting and therefore wrongful in addition to the subjective element where the plaintiff feels offended.⁴⁵ A subjective and objective test bridges the gap between different perceptions of what is harmless to one and harmful to another by adopting a middle ground of a reasonable person in the circumstances of the victim. The reasonable person in the position of the

⁴¹ *J v M* (1989) 10 ILJ 755 (IC) at 757 and *Reddy v University of Natal* 1998 (1) BLLR 29 (LAC) at 31-2.

⁴² 1989 (2) SA 857 (A).

⁴³ *J v M* supra (n41) at 757.

⁴⁴ *Reddy* supra (n41) at 31-2.

⁴⁵ *De Lange* supra (n42).

victim test is compatible with *De Lange*,⁴⁶ which advances an objective test of impairment of dignity and the reasonable person in the position of the victim test and is in harmony with the Constitution.⁴⁷

It is emphasized that the objective test guards against a floodgate of frivolous claims whilst taking into account the legal convictions of the community and the spirit, purport and objects of the Bill of Rights. Furthermore, it is argued that since *common-law* vicarious liability is a no-fault liability as far as it relates to the employer, the objective test helps keep liability of the employer within manageable and reasonable bounds.

It is submitted that a subjective test might lead to a flood of litigation where hypersensitive people claim to have suffered sexual harassment even though the conduct is not objectively offensive. This test takes into account the totality of the circumstances and determines whether the conduct complained of was subjectively perceived by the plaintiff; and whether a reasonable person in the position of the victim would have found the conduct offensive, as the plaintiff did. The objective element 'in the position of the victim' further ensures that the test is not applied in vacuum in total disregard of the reasonable person's reaction to a similar environment under comparable circumstances.

The reasonable person in the position of the victim test is gender blind or gender neutral, objectively determined and thus gives effect to the spirit of the EEA, which outlaws gender discrimination as a form unfair discrimination and protects both women and men subjected to sexual harassment. Furthermore, the reasonable person in the position of the victim test is proposed in the interest of justice because it is consistent with the Constitution in that it gives equal protection of the law for both women and

⁴⁶ *Ibid.*

⁴⁷ See *Dendy v University of Witwatersrand, Johannesburg and others* [2005] 2 All SA 490 (W) at para 29, where the High Court held the *De Lange v Costa* hybrid test which consists of a subjective and objective assessment of infringement of dignity, was consistent with the Constitution.

men (gender neutral) and promotes the spirit, purport, and objects of the Bill of Rights (objective).

Chapter Four - A Case for Regarding Sexual Harassment as Gender Discrimination

4.1 Outline

This chapter will explore various theories advanced for regarding sexual harassment as gender discrimination and contextualize what is exactly wrong with sexual harassment. It is important that the principles of gender discrimination must be outlined to show how and to what extent they have captured the harm of sexual harassment beyond a mere explanation that sexual harassment constitutes gender discrimination because it happens to women as women.

'Gender' and 'sexual' are used interchangeably to highlight the multifacets attendant in the harm of sexual harassment which include an impairment of dignity; unfair discrimination; violation of constitutional rights; economic harm; and work sabotage. 'Sexual' conduct is primarily motivated by sexual desire and entails treating women as sex objects. 'Non-sexual' forms of sexual harassment have the effect of treating women in the workplace as sub-human, sub-citizens and sub-workers on the basis of 'gender' and often includes 'non-sexual' conduct which makes it difficult for them to pursue their careers and be productive in their jobs, and often lead to constructive dismissal. Sexual harassment amounts to gender discrimination because it promotes gender hierarchy at work and creates Chinese-walls between male career-progress, which is unhindered, and female career-progress, which is suppressed.

The Office of the Status of Women noted that 'although gender discrimination has been removed from labour laws, this has not been

sufficient to achieve equality in women's participation in the paid labour force'.¹

4.2 What is discrimination?

The term 'discrimination' is defined in article 1 of the United Nations Convention on the elimination of all forms of discrimination against Women² to mean:

[A]ny distinction, exclusion or restriction made *on the basis of sex* (emphasis added) which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

It is emphasized that the above definition uses 'on the basis of sex' to denote gender as a basis of discrimination, and not 'sexual conduct' in the sense of conduct primarily motivated by sexual desire. It is conceded that the difficulty appears to be the fact that the term 'sexual' is being used interchangeably in a narrow as well as a broad sense because 'sex' is used in 'the dual sense of biological sex and social gender' and in the 'third sense of sexuality'.³ It is also clear from the above definition that inherent in discrimination is differential treatment 'on the basis of sex' (gender) without legal justification which has an adverse effect of eroding the freedom of women, and free enjoyment and exercise of their human rights.

MacKinnon states that the discrimination aspect in sexual harassment is evident in the fact that sexual harassment results in both sexual exploitation of women and 'economic exploitation' of women thereby 'enforcing women's

¹ Office on the Status of Women 'South Africa's National Policy Framework for Women's Empowerment and Gender Equality' (2000).

² UN General Assembly 'Convention on the Elimination of All Forms of Discrimination against Women' (1979).

³ CA MacKinnon *Sexual Harassment of Working Women: A Case of Sexual Discrimination* (1979) at 170.

second economic-class status'.⁴ A case for regarding sexual harassment as gender discrimination is correctly conceptualized by MacKinnon as:

a practice of inequality on the basis of gender, an integral act of subordinate civil status because of sex, a practice of treating a person as less than fully socially human because that person is a woman or a man, a status-based treatment of hierarchy, of dominance, that is illegal.⁵

Sexual harassment has a discriminatory effect on women because they suffer work sabotage, unequal work opportunities, sexual and economic exploitation, and victimisation based on their gender. The effect of gender discrimination is evident from a human resource perspective, because the harm of sexual harassment can 'cause a decline in employee performance and productivity' and ultimately result in 'higher recruitment and training costs, loss of skilled people, potential labour relations breakdown and high litigation costs'.⁶

4.3 Statutory prohibition of gender discrimination

In South Africa, the legal basis of a claim for sexual harassment is in terms of section 6(1) and 6(3) of the EEA, which outlaws sexual harassment as a form of unfair discrimination based on gender, which reads as follows:

- 1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth
- 2) ...
- 3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

The EEA therefore makes it unlawful to discriminate on grounds of gender in an effort to achieve gender equality in the workplace by eliminating

⁴ MacKinnon *op cit* (n3) 177.

⁵ CA MacKinnon *Women's Lives, Men's Laws* (2005) at 186.

⁶ PS Nel, PS van Dyk, GD Haasbroek, HB Schultz, T Sono and A Werner *Human Resources Management* 6ed (2004) at 294.

all gender discriminatory barriers to equal participation in the workplace. Harassment must be discriminatory in order to violate the EEA since gender is designated as a protected class. Levy and Paludi correctly suggest that the behaviour or environment created by harassment must have the 'effect of making success on the job more difficult for one gender than the other'.⁷

It is highlighted that the EEA (in terms of section 9(4) of the Constitution) gives effect to and regulates the constitutional prohibition of unfair discrimination in the employment context, and thus becomes the primary (in practice, exclusive) point of reference in dealing with discrimination in this context. In *Minister of Health and Another v New Clicks SA (Pty) Ltd and Others*⁸ the Constitutional Court held that:

Where ... the Constitution requires Parliament to enact legislation to give effect to the constitutional rights guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. ... And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect by the legislation in question.

This does not detract from the need to interpret the EEA 'in compliance with the Constitution'⁹ and infuse the prohibition of 'sexual harassment' with the principle of upholding the fundamental right to dignity and equality.

Furthermore, 'the need to eliminate unfair discrimination does not arise only from Chapter 2 of our Constitution' but 'also arises out of international obligation'.¹⁰ Therefore, the EEA 'must be interpreted in compliance with'¹¹ the International Labour Organisation (ILO) Convention (No. 111) of 1958 on discrimination (Employment and Occupation), which is

⁷ AC Levy and MA Paludi *Workplace Sexual Harassment* 2ed (2002) at 28. Discrimination on grounds of gender is also outlawed in terms of section 6(3) of the EEA, in addition to sections 9(3)-(4) of the Constitution.

⁸ 2006 (1) BCLR 1 (CC) at para 437.

⁹ S 3(a) EEA.

¹⁰ *Hoffmann v South African Airways* 2001 (1) SA 1 (CC) at para 51.

¹¹ S 3(d) EEA.

binding on South Africa since it was ratified in 1997.¹² This Convention contains an instructive definition of 'discrimination', which is defined as follows:

any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation...¹³

The abovementioned definition of 'discrimination' must therefore assist in delineating the meaning of 'harassment' in the employment context because sexual harassment is a form of 'sex' discrimination, which falls squarely within the provisions of Convention No. 111. Furthermore, Chappell and Di Martino emphasize that in examining the ILO member States' reports on Convention No. 111, the ILO Committee of Experts on the Application of Conventions and Recommendations noted that 'sexual harassment undermines equality at work by calling into question integrity, dignity and the well-being of workers'.¹⁴

It is noted that in any event, even though South Africa has ratified Convention No. 111, the 1998 ILO Declaration on Fundamental Principles and Rights at Work 'commits Member States to respect and promote principles and rights in four categories, whether or not they have ratified the relevant Conventions'.¹⁵ The four core principles are the following:

...freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.¹⁶

Therefore, South Africa is duty bound in terms of its international obligations in Convention No. 111 and the ILO Declaration on Fundamental Principles and Rights at Work, to adopt measures, which address and challenge the

¹² See section 231(2) of the Constitution which states that an international agreement is binding on the Republic of South Africa once it has been ratified.

¹³ Article 1, 1 (a) of Convention 111 concerning Discrimination (Employment and Occupation), 1958.

¹⁴ D Chappell and V Di Martino *Violence at Work* 3ed (2006) at 266-7.

¹⁵ Available at www.ilo.org (Accessed 14 September 2007).

¹⁶ *Ibid.*

elimination of sexual harassment as a form of gender discrimination in respect of employment and occupation.

The 2005 Code recognizes sexual harassment as a form of gender discrimination and is prohibited on grounds of sex and/or gender and/or sexual orientation.¹⁷ This does not only broaden the scope for regarding sexual harassment as gender discrimination, but also includes same-sex harassment as a form of sexual harassment and unfair discrimination. In dealing with issues of unfair discrimination in employment, section 3 of the EEA enjoins that the 2005 Code must be taken into account when dealing with sexual harassment, which constitutes gender discrimination under the section 6(3) of the EEA.

In the United States, sexual harassment is recognized as a form of gender discrimination and is outlawed in Title VII, which prohibits employment discrimination based sex.¹⁸ The feminist theory instigated by Catherine MacKinnon in her book 'Sexual Harassment of Working Women' - (1979) on regarding sexual harassment as a case for gender discrimination was of fundamental importance in transforming the law on sexual harassment in the United States, which has led to successful litigation of sexual harassment cases.

4.4 Why sexual harassment is a case of gender discrimination?

Rubenstein rightly opines that sexual harassment is a case of 'employment discrimination' as follows:

¹⁷ Item 3 2005 Code.

¹⁸ S 703 (a)(1) of Title VII of the Civil Rights Act of 1964 provides that:

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...

That it takes place in the context of unequal power, that underlying the sexual advance is the mutual knowledge (whether made explicit or remaining implicit) that the man is in the position to apply job-related sanctions, is the reason why sexual harassment is properly viewed as an employment discrimination.¹⁹

It is submitted that some men may seek to preserve their organizational power and masculinity in the workplace in an attempt to sabotage women's economic independence and maintain their own economic, gender and political superiority in employment. The essence of legislation outlawing gender discrimination is 'whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed'.²⁰ Sexual harassment is a form of discrimination, which tends to perpetuate gender bias and discriminatory treatment of women by placing women 'in a cage rather than on a pedestal'.²¹ Women suffer sexual harassment because of their gender and MacKinnon advances three reasons to justify this point:

First, the exchange of sex for survival has historically assured women's economic dependence and inferiority as well as sexual availability to men. Second, sexual harassment expresses the male sex-role pattern of coercive sexual initiation toward women, often in vicious and unwanted ways. Third, women's sexuality largely defines women as women in this society, so violations of it are abuses of women as women.²²

Sexual harassment reaches the proportions of sex discrimination precisely because the conduct is disproportionately more offensive or demeaning to one sex as was held in the American case of *Robinson v Jacksonville Shipyards, Inc*²³ where demeaning pictures of naked women were pinned up in the workplace. In addition to visual material, there was graffiti directed at the employee, sexually explicit material placed in the employee's personal toolbox, and co-workers repeatedly made comments of a sexual nature to the employee and her co-workers.

¹⁹ M Rubenstein 'The Law of Sexual Harassment at Work' (1983) 12 *ILJ* 1 at 2.

²⁰ *Harris v Forklift Systems Inc* 510 US 17 (1993) at 25.

²¹ *Frontiero v Richardson* 411 US 677 (1973) at 684.

²² MacKinnon *op cit* (n3) 174.

²³ 760 F Supp 1486 (M D Fla 1991).

The court held that the female welder at a shipyard was discriminated against based on the existence of a hostile work environment and but for fact of her gender, she would not have been the object of harassment. The court added that the presence of pictures sexualized the work environment to the detriment of all female employees. Sexual harassment is gender discrimination because it discriminates against women based on the membership of a protected category of gender. It is emphasized that sexual harassment has a discriminatory effect because it subordinates women to men. MacKinnon correctly outlines the discriminatory nature of sexual harassment in that it 'perpetuates the interlocked culture by which women have been kept sexually in thrall to men and at the bottom of the labour market' and results in the two forces converging - that is to say, 'men's control over women's sexuality and capital control over employee's work lives'.²⁴

4.5 Hostile Environment harassment as a case of gender discrimination

Gender discrimination is not limited to *quid pro quo* type of sexual harassment necessitating the victim of sexual harassment to prove a tangible employment action or pecuniary loss because of sexual harassment.

An analysis of the United States cases is instructive in establishing how sexual harassment can create a hostile environment for the plaintiff thereby amounting to gender discrimination. In the United States, a hostile type of sexual harassment can amount to gender discrimination without requiring the plaintiff to evince 'tangible loss' of 'an economic character'. It is for this reason that the court in *Meritor Savings Bank v Vinson*²⁵ rejected the petitioners argument to dismiss the plaintiff's claim for sexual harassment on grounds that in prohibiting discrimination with respect to 'compensation, terms, conditions, or privileges' of employment, the Congress was concerned with a

²⁴ MacKinnon *op cit* (n3) 174.

²⁵ 477 US 57 (1986) at 64.

'tangible loss' of 'an economic character', not with; 'purely psychological aspects of the workplace environment'. The court held that the language of Title VII is not limited to 'economic' or 'tangible' discrimination and that the phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.²⁶

In *Harris v Forklift Systems Inc*²⁷ the court correctly recognized the link between job segregation on grounds of gender, a hostile work environment, and 'non-sexual' forms of sexual harassment, not motivated by sexual desire but nevertheless serving to undermine the competence of women as workers. The court also noted that the plaintiff need not prove that the discriminatory conduct unreasonably interfered with her performance or productivity and actually made it difficult for her to do the job thus offending gender equality in the workplace.²⁸

The court held that a discriminatory hostile work environment, even one that does not seriously affect employee's job performance, discourages employees from remaining on the job, or keep them from advancing in their careers.²⁹ The court reasoned that in order to establish a 'hostile environment sexual harassment' it suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job.³⁰ It is submitted that it is sufficient that sexual harassment affects the plaintiff's work morale and results in difficult working conditions.

It is suggested that in South Africa it matters not whether the plaintiff has suffered an additional tangible employment action to succeed in proving

²⁶ *Ibid.*

²⁷ *Supra* (n20).

²⁸ *Supra* (n20) at 25.

²⁹ *Supra* (n20) at 22.

³⁰ *Supra* (n20) quoting *Davis v Monsanto Chem Co* 858 F 2d 345 (6th Cir 1988) at 349.

a case of gender discrimination. In *Henson v City of Dundee*³¹ the court held that sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. The court noted that a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living could be as demeaning and disconcerting as the harshest of racial epithets.³² The court was of the view that sexual harassment inflicted upon an employee because of her sex is a pattern of behaviour that inflicts disparate treatment upon a member of one sex with respect to terms, conditions, or privileges of employment. The court thus concluded that there is no requirement that an employee subjected to such disparate treatment prove in addition that she has suffered tangible job detriment.

In *Barnes v Costle*³³ the court dismissed the complainant's case for gender discrimination when her job was abolished because she had repulsed her male superior's sexual advances. The court held that she was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor. On appeal, the court found in favour of the complainant, reversed the district court summary judgment, and recognized the conditioning of employment enhancement on granting of sexual favours as sex discrimination. The Appeal Court held that but for her womanhood, her participation in sexual activity would never have been solicited. The court reasoned that to say that she was victimized in her employment simply because she declined the invitation is to ignore the asserted fact that she was invited only because she was a woman subordinate to the inviter in the hierarchy of agency personnel.³⁴

³¹ 682 F 2d 897 (1982) at 902.

³² *Ibid.*

³³ 561 F 2d 983 (DC Cir 1977). See also *Bundy v Jackson* 641 F 2d 934 (DC Cir 1981), where the court accepted that hostile environment harassment amounts to gender discrimination which the woman would not have suffered but for her gender.

³⁴ *Supra* (n33) at 990.

It is concluded that sexual harassment is therefore a form of gender discrimination in that:

- a) it unfairly prejudices women and men by virtue of their membership to a protected class - that is to say, gender;³⁵
- b) it materially discriminates on the working conditions, terms and benefits of employment for women; and
- c) it is a barrier to gender equality in the workplace.

It is submitted that the key test in gender discrimination is that 'but for' her gender, she would not have suffered detrimental working conditions. This means that membership of a protected class is causally linked to sexual harassment. Sexual harassment amounts to gender discrimination when women suffer a disadvantage because they are women, and irrespective of whether the employee suffers a tangible employment action because of unfair discrimination.

4.6 What is wrong with sexual harassment?

The fundamental issue of equality is not whether one is the same or different; it is not the gender difference; it is the difference gender makes. ...To be on the bottom of a hierarchy is certainly different from being on the top of one, but it is not simply difference that distinguishes the two. It is, in fact, the lesser access to resources, privileges, credibility, legitimacy, authority, pay, bodily integrity, security, and power that makes the two unequal.³⁶

It is argued that sexual harassment instils gender stereotypes to the detriment of harmonious relations between men and women in the workplace, because women are judged, treated, related to as women, not as human beings and workers worthy of *ubuntu*, respect, and dignity. Franke opines that what is wrong with sexual harassment as constituting gender discrimination is that it is a 'technology of sexism' which 'perpetuates, enforces, and polices a set of

³⁵ Ss 6 (1) EEA and 9 Constitution.

³⁶ CA MacKinnon *Are Women Human?: And Other International Dialogues* (2006) at 74.

gender norms that seek to feminize women and masculinize men'.³⁷ It is argued that sexual harassment focuses on women's sexuality, which is unrelated to their ability, potential, and merit to do the work. It is emphasized that sexual harassment serves to disadvantage women and preserves the order of things in the workplace thereby undermining precepts of gender equality, which are guaranteed in the Constitution.³⁸

Mowatt states that sexual harassment occurs 'when a woman is expected to engage in sexual activity in order to obtain or keep her employment, or obtain promotion or other favourable working conditions'.³⁹ The example highlighted by Mowatt⁴⁰ that sexual harassment occurs when a woman is coerced to engage in sexual activity in order to obtain tangible employment benefits can be equated with forced prostitution where a woman is paid money in exchange for sex. It is submitted that in the case of sexual harassment a woman engages in sexual intercourse with a man in return for fringe benefits, which is prostitution in disguise because there is an economic *quid pro quo* element present. It is suggested that sexual harassment amounts to gender discrimination because women are expected to use their gender as a bargaining chip to secure employment benefits or suffer economic harm if they withhold sexual access to their supervisors.

MacKinnon opines that sexual harassment is wrong because it violates the workers' 'right to work in an environment that is not discriminatorily oppressive, one in which they can be productive and survive materially free of sexual exactions'.⁴¹ Therefore, sexual harassment makes it difficult for women to receive fair recognition for their hard work but instead employment benefits are based on their sexual compliance/non-compliance. Abrams opines that gender discrimination is wrong because it 'disadvantages

³⁷ KM Franke 'What is Wrong with Sexual Harassment' (1997) 49 *Stan L Rev* 691 at 696.

³⁸ See s 9 Constitution.

³⁹ JG Mowatt 'Sexual Harassment - New Remedy for an Old Wrong' (1986) 7 *ILJ* 637 at 638.

⁴⁰ *Ibid.*

⁴¹ MacKinnon *op cit* (n3) 181.

its victims as workers'⁴² and 'helps perpetuate the workplace as a site of male control',⁴³ where 'gender hierarchy is the order of the day and masculine norms structure the working environment'.⁴⁴ Abrams asserts that sexual harassment is aggravated by the fact that it compromises:

the potential opportunities implicit in work, such as a greater economic self-sufficiency and the exploration of new roles, career opportunities and new conceptions of the self not linked to stereotyped expectations.⁴⁵

Franke opines that 'construed according to formal equality principles, the wrong of sex discrimination amounts to dissimilar treatment of otherwise similarly situated workers'.⁴⁶ It is submitted that where women are treated differently than their male counterparts, they are being discriminated against on their terms, privileges, and conditions of employment because of their gender. Ehrenreich correctly suggests a human rights approach and argues for distinguishing 'between the dignitary nature of the harm of workplace harassment and the discriminatory context in which much harassment occurs'⁴⁷ because:

By focusing on the nature of the harm of sexual harassment, sexual harassment is viewed as wrong not because it wrongs women, but because such treatment would deeply wrong any human being, regardless of sex.⁴⁸

It is submitted that the dignitary nature of the harm of sexual harassment is the core of discrimination because women as workers, rightful citizens, and human beings with self-autonomy must be vindicated and not marginalised as sex objects because of their gender. The discriminatory context enquiry, which vindicates gender equality, is thus secondary to protection of dignity and liberation of women as human beings. MacKinnon opines that sexual harassment is wrong because 'it deprives women of personhood by relegating

⁴² K Abrams 'The New Jurisprudence of Sexual Harassment' (1998) 83 *Cornell L Rev* 1169 at 1218.

⁴³ Abrams *op cit* (n42) 1198.

⁴⁴ Abrams *op cit* (n42) 1219.

⁴⁵ Abrams *op cit* (n42) 1219-20.

⁴⁶ Franke *op cit* (n37) 712.

⁴⁷ R Ehrenreich 'Dignity and Discrimination: Towards a Pluralistic Understanding of Workplace Harassment' (1999) 88 *Geo LJ* 1 at 53.

⁴⁸ Ehrenreich *op cit* (n47) 21.

them to subservience through jointly exploiting their sexuality and their work'.⁴⁹ Sexual harassment perpetuates sexism, amounts to abuse of masculine power, inflicts economic and dignitary harm on women and is 'non-work-relevant, harmful behaviour aimed disproportionately at women'.⁵⁰

4.7 Relationship between equality and dignity

Thus women are transforming the definition of equality not by making ourselves the same as men, entitled to violate and silence, or by reifying women's so-called differences, but by insisting that equal citizenship must encompass what women need to be human, including a right not to be sexually violated and silenced.⁵¹

This section deals with the overlap between the rights to equality and dignity; and the values of equality and dignity in an effort to contextualize the harm of sexual harassment against the background of the Constitution. There is an ongoing debate on the relationship between dignity and equality in the context of the Constitution. Albertyn and Goldblatt suggest that the value of dignity should not inform the right to equality but that the right to equality should be 'primarily informed by the value of equality' untrammelled by any considerations of the value of dignity.⁵²

Fagan similarly suggests that dignity does not lie 'at the heart of the prohibition on unfair discrimination'⁵³ but that equality should be understood in its context as being based on the partial infringement of an 'independent constitutional right or a constitutionally-grounded egalitarian principle'.⁵⁴ The writer is therefore of the view that the essence of equality is to uphold the 'protection of all independent constitutional rights' whereas the effect of the

⁴⁹ MacKinnon *op cit* (n3) 177.

⁵⁰ JE Gruber and P Morgan *In the Company of Men: Male Dominance and Sexual Harassment* (2005) at 119.

⁵¹ MacKinnon *op cit* (n36) 48.

⁵² C Albertyn and B Goldblatt 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 SAJHR 248 at 254.

⁵³ A Fagan 'Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood' (1998) 14 SAJHR 220 at 224. See also *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) at para 79, where Ngcobo J held that 'dignity is an underlying consideration in the determination of unfairness'.

⁵⁴ Fagan *op cit* (n53) 226.

dignity-analysis of unfair discrimination is to elevate the protection of only one right - that is to say, right to dignity, above all other constitutional rights.⁵⁵ Davis also states that 'equality is too central a concept to be relegated to a secondary meaning' and:

The Court needs to look at equality as a value which seeks to promote a democratic society that recognizes and promotes difference and individual as well as group diversity and thereby exhibit a commitment to ensuring that all within society enjoy means and conditions to participate significantly as citizens.⁵⁶

Cowen strongly supports an intimate relationship between dignity and equality. She disagrees with the proposition advanced by Albertyn and Goldblatt,⁵⁷ and opines that 'the value of equality - as a comparative concept - cannot alone support the equality right, and that the place of dignity as its kingpin can be defended'.⁵⁸ Cowen therefore believes in the transformative power of the value of dignity, which 'informs the meaning of other rights'⁵⁹ and its pivotal role 'to guide and serve the Court's equality jurisprudence'.⁶⁰ Liebenberg defends the value of dignity in giving meaning to socio-economic rights and argues that 'respect for human dignity requires society to marshal its resources and respond strongly to situations in which certain groups are unable to gain access to basic socio-economic needs'.⁶¹ The writer recognizes a link between elevating the value of dignity and the essence of socio-economic rights and opines that 'the consequences of the deprivation will be severe (either in terms of threats to life or health) and erode the foundations for further development of people's capabilities'.⁶²

⁵⁵ Fagan *op cit* (n53) 247.

⁵⁶ DM Davis 'Equality: The Majesty of Legoland Jurisprudence' (1999) 116 *SALJ* 398 at 413-4.

⁵⁷ Albertyn and Goldblatt *op cit* (n52).

⁵⁸ S Cowen 'Can "Dignity" Guide South Africa's Equality Jurisprudence' (2001) 17 *SAJHR* 34 at 54.

⁵⁹ Cowen *op cit* (n58) 55.

⁶⁰ Cowen *op cit* (n58) 58.

⁶¹ S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *SAJHR* 1 at 17.

⁶² *Ibid.*

It is submitted that the views advanced by Cowen⁶³ and Liebenberg⁶⁴ are convincing in that the value of dignity informs all other rights protected in the Bills of Rights. This value will be nullified if the impairment of dignity aspect of sexual harassment (where women are deprived of their 'ubuntu', liberty, autonomy, and livelihood) is not acknowledged. It is underscored that women will thus be deprived of the promise of the constitutional protection of their rights if they are treated as less of human beings in the workplace and are denied their freedom of choice and freedom to reach their maximum potential in their careers. Furthermore, the resultant effect of sexual harassment is that women can never enjoy and assert their equality if they are treated as sex objects subject to unfair discrimination; and their human worth, 'ubuntu' and self-respect is transgressed.

MacKinnon states that:

Sexual harassment rulings gave women sex equality rights they had lacked, and in so doing provided legally enforceable standards that promoted self-respect and entitlement to inviolability and dignity that women did not have before.⁶⁵

This statement correctly presupposes that without protection of human dignity, women suffered inequality. Dignity is a human attribute which is violated when a person is subjected to treatment which is 'degrading or humiliating or to conduct which treats a person as subhuman'.⁶⁶ Dignity 'interfaces with many, and indeed implies respect for all, of a person's rights'⁶⁷ and is thus 'a source of a person's innate rights to freedom and to physical integrity, from which a number of other rights flow'.⁶⁸ It is stressed that gender discrimination (a form of unfair discrimination) is differential treatment (violation of equality) which simultaneously impairs the person's

⁶³ Cowen *op cit* (n58).

⁶⁴ Liebenberg *op cit* (n61).

⁶⁵ MacKinnon *cit* (n5) 172.

⁶⁶ A Cachalia, H Cheadle, D Davis, N Hayson, P Maduna and G Marcus *Fundamental Rights in the New Constitution* (1994) at 34.

⁶⁷ *Ibid.*

⁶⁸ I Currie and J de Waal *The Bill of Rights Handbook* 5ed (2005) at 273.

fundamental dignity as an autonomous human being, as highlighted in the following passage:

The value of dignity is thus of central importance to understanding unfair discrimination. Unfair discrimination is differential treatment that is hurtful or demeaning. It occurs when law or conduct, for no good reason, treats some people as inferior or incapable or less deserving of respect than others.⁶⁹

It is emphasized that there can never be equality without respect for dignity hence sexual harassment in the workplace has been conceptualized as an affront to dignity and as such an obstacle to gender equality. Dignity is underscored because it is the *alpha* and *omega*⁷⁰ of the Constitution and a foundation of all other human rights entrenched in the Bill of Rights. The Constitutional Court in *S v Makwanyane and Another*⁷¹ reiterated that 'recognizing a right to dignity is an acknowledgement of the intrinsic worth of human beings', deserving of 'respect and concern'. Dignity focuses on sexual harassment as an individual harm in that every person has an individual right to dignity and as such sexual harassment is a violation of individuality, humanity and self autonomy.

It is emphasized that the relationship and overlap between equality and dignity is relevant because sexual harassment is a form of gender discrimination and an affront to dignity of women as human beings. Sachs J in *National Coalition for Gay and Lesbian Equality v Minister of Justice*⁷² endeavoured to outline the scope of equality as being 'based on the impact that the measure has on a person because of membership of an historically vulnerable group that is identified and subjected to disadvantage by virtue of certain closely held personal characteristics'. Furthermore, Sachs J defined equality to mean 'equal concern and respect across difference' and 'affirms

⁶⁹ Currie and de Waal *op cit* (n68) 244.

⁷⁰ Alpha and omega means: 1. The first and the last: 'I am Alpha and Omega, the beginning and the ending, saith the Lord' (Revelation 1:8). 2. The most important part. Available at www.dictionary.com (accessed 23 March 2006).

⁷¹ [1995] 6 BCLR 665 (CC) at para 328.

⁷² [1998] 12 BCLR 1517 (CC) at para 124.

that difference should not be the basis for exclusion, marginalisation, stigma, and punishment'.⁷³

It is for this reason that if there is no differentiation, then there can be no question of violation of the right to equality in section 9 of the Constitution.⁷⁴ However, Sachs J correctly emphasized that the question of dignity 'is central to the question of equality'.⁷⁵ In the context of sexual harassment, it is argued that dignity is central to the restoration of equality. How can one assert and celebrate equality when one cannot celebrate and enjoy one's humanity/*ubuntu*? Sachs J concluded that inequality exists 'not simply through group-based differential treatment, but through differentiation which perpetuates disadvantage and leads to the scarring of the sense of dignity and self-worth associated with membership of the group'.⁷⁶ Therefore, 'the commonality that unites them all is the injury imposed upon people as a consequence of their belonging to certain groups'.⁷⁷

It is submitted that although equality is an independent right and value entrenched in the Constitution, it must not be interpreted as being of secondary importance as correctly stated by Davis,⁷⁸ Albertyn and Goldblatt.⁷⁹ Instead, it is suggested equality and dignity as essential pillars of the Constitution, fundamental rights, and values entrenched in the Constitution are interrelated, in harmony with each other, and do not exist in vacuum. Furthermore, it is emphasized that both equality and dignity are kingpins in transforming and democratizing the workplace. Viewed in this context, sexual harassment is best conceptualized in an interrelated approach as a violation of dignity suffered because of difference on the basis of gender. Women are thus treated with indignity and as second-class citizens, by virtue

⁷³ *National Coalition supra* (n72) at para 132.

⁷⁴ *Currie and de Waal op cit* (n68) 236.

⁷⁵ *National Coalition supra* (n72) at para 128.

⁷⁶ *Ibid.*

⁷⁷ *National Coalition supra* (n72) at para 126.

⁷⁸ *Davis op cit* (n56).

⁷⁹ *Albertyn and Goldblatt op cit* (n52).

of difference. Central to equality is restoring dignity, which is violated because of difference on grounds of gender. Conversely, central to dignity is restoring equal respect and *ubuntu* denied to women by virtue of membership to a protected class as Goldstone J correctly held in *President of the Republic of South Africa and Another v Hugo*⁸⁰ that:

At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human rights will be accorded equal dignity and respect regardless of their membership of particular groups.

Similarly, in *Prinsloo v Van Der Linde and Another*⁸¹ Ackermann, O'Regan and Sachs JJ recognized the coherence between dignity and equality, and held that unfair discrimination 'principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity'.

It is submitted that dignity affirms the individual essence of women as human beings primarily. Equality affirms women as a protected class vulnerable to exploitation because of gender and therefore eliminates disparate treatment by promoting respect of genders at an equal level. Equality therefore focuses on sexual harassment as a group harm and class action, which is an obstacle to gender equality in the workplace. Equality seeks to eliminate unfair discrimination, which is based on immutable personal characteristics listed in section 9(3) of the Constitution.⁸² Equality looks at sexual harassment at a macro level of gender discrimination concerned with freedom and liberty of women, and focuses on equal access, equal treatment, and equal opportunities in the workplace. It is underscored that women cannot be liberated as a class (gender equality) if they are not liberated as autonomous individuals (dignity).

⁸⁰ 1997 (6) BCLR 708 (CC) at para 41.

⁸¹ 1997 (3) SA 1012 (CC) at paras 31-3.

⁸² S 9(4) Constitution prohibits unfair discrimination on the following listed grounds: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture language and birth.

Baer correctly summed up the coherence between dignity and equality in the context of sexual harassment, as follows:

Sexual harassment law, then, looked at from a comparative perspective, seems to be at its best when grounded in this interrelated approach. The question is not 'dignity' or 'equality?' but what features the law has to offer to guarantee individual dignity on an equal basis for all.⁸³

Viewed in this context, equality and dignity are not in conflict with each other but are coherent and central to the legal redress of gender discrimination and the elimination of sexual harassment in the workplace. Sachs J correctly stressed in *National Coalition*⁸⁴ that the equality and dignity concepts 'should not be seen as competitive but rather as complementary'.

4.8 United Kingdom approach to sexual harassment

Prior to October 2005, in the United Kingdom, sexual harassment was not specifically prohibited or legally defined in terms of the legislation. Instead, a claim for sexual harassment was based on grounds of gender discrimination contained in section 1 of the Sex Discrimination Act of 1975 ('SDA'), as the United Nations noted that:

Neither the Sex Discrimination Act (1975) nor the Employment Rights Act (1996) explicitly regulate sexual harassment, but many instances of sexual harassment will amount to sex discrimination for the purposes of the 1975 Act and the courts refer to the EC Code of Practice on the Dignity of Women and Men at Work (92/131/EC) for guidance on the definition of sexual harassment⁸⁵

In English law, this meant that for sexual harassment to be actionable it must amount to gender discrimination. Ishmael and Alemoru correctly stated that there might be acts which might be considered as constituting sexual harassment by the victims but which will not necessarily amount to

⁸³ S Baer 'Dignity or Equality? Responses to Workplace Harassment in European, German, and U.S. Law' in *Directions in Sexual Harassment Law* CA MacKinnon and RB Siegel (2004) at 595.

⁸⁴ *Supra* (n72) at para 125.

⁸⁵ United Nations Economic Commission for Europe 'Report on Sexual Harassment in the Workplace in EU Member States' (June 2004) at 19.

discrimination under the SDA.⁸⁶ It is argued that this re-enforces the conclusion that sexual harassment is more than just gender discrimination and has many other facets which include violation of self, impairment of dignity, invasion of privacy and violation of the freedom to choose with whom one has intimate relations.

In *Strathclyde Regional Council v Porcelli*,⁸⁷ two male colleagues carried out a deliberate campaign of vindictiveness against Porcelli, some of it of a sexual nature, with an objective to force her to leave her job. The Employment Appeal Tribunal rejected the respondent's argument that they would have treated a man, whom they disliked, in exactly the same way as Porcelli. The tribunal reasoned that if the form of the unfavourable treatment or any material part of it, which is meted out, included a significant element of a sexual character to which a man would not be vulnerable, the treatment is on grounds of the woman's sex. In terms of *Porcelli*,⁸⁸ it is therefore sufficient to establish that discrimination was based on gender and it is not necessary to prove that a male counterpart would have received similar treatment. The tribunal was thus of the view that sexual harassment amounts to gender discrimination in that it happens to women solely because of their gender, irrespective of whether it would have been directed at a comparable man.

In another Employment Appeal Tribunal case of *Reed and Bull Information Systems Ltd v Stedman*,⁸⁹ the complainant alleged gender discriminatory constructive dismissal because of sexual harassment. The tribunal held that the enquiry is firstly whether the alleged victim has been subjected to a detriment and, secondly, was it on the grounds of sex. The tribunal held that:

It seems to us important at the outset that 'sexual harassment' is not defined by statute. It is a colloquial expression, which describes one form of discrimination in

⁸⁶ A Ishmael and B Alemoru *Harassment, Bullying and Violence at Work: A Practical Guide to Combating Employee Abuse* (1999) at 179.

⁸⁷ [1986] IRLR 134.

⁸⁸ *Ibid.*

⁸⁹ (1999) IRLR 299 EAT.

the workplace made unlawful by s.6 of the Sex Discrimination Act 1975. Because it is not a precise or defined phrase, its use, without regard to s.6, can lead to confusion. Under s.6 it is unlawful to subject a person to a 'detriment' on the grounds of their sex. Sexual harassment is a shorthand for describing a type of detriment. The word detriment is not further defined and its scope is to be defined by the fact-finding tribunal on a common-sense basis by reference to the facts of each particular case. The question in each case is whether the alleged victim has been subjected to a detriment and, second, was it on the grounds of sex.⁹⁰

The tribunal noted that the motive and intention of the alleged discriminator is not an essential ingredient although it will often be a relevant factor to take into account. Therefore, lack of intent is not a defence. The tribunal held that the second question must always be asked, but in a sexual harassment case, the answer will usually be quite clear without resort to a comparator, actual or hypothetical.

In the light of *Reed*,⁹¹ it has been established that sexual harassment may constitute a detriment in the United Kingdom and absence of intent is not a defence. The English tribunals accept a subjective concept of 'detriment' and do not require fault (intention) on the part of the perpetrator before a sexual harassment claim can succeed. Absence of intent to discriminate on grounds of gender is similarly not a defence in South Africa in terms of the anti-discrimination legislation as contained in the EEA. It is argued that lack of intent is only relevant when pursuing a delictual remedy for the impairment of dignity. It is not necessary in order to successfully invoke gender discrimination to compare whether a male would have reacted the same or would have found the act or words offensive. That is, it is sufficient when proving gender discrimination to find that sexual harassment was experienced by the woman by virtue of her gender. It is established that a

⁹⁰ *Reed* supra (n89) at 302. The English Court of Appeal considered the meaning of detrimental treatment in *Peake v Automotive Products Ltd* [1978] QB 333 at 240, where Slynn LJ reasoned that it 'involves an element of something which is inherently adverse or hostile to the interests of the persons of the sex which is said to be discriminated against'. In addition, in *Ministry of Defence v Jeremiah* [1980] QB 87 at para 22, Lord Justice Brandon held that 'subjecting to any other detriment' does not mean anything more than 'putting under a disadvantage'.

⁹¹ *Ibid.*

detriment is therefore a form of indignity, prejudice, disadvantage, or disparate treatment suffered by women because of their gender.

It is clear from the above case law that the English tribunals made great strides, in the absence of the definition of 'sexual harassment', to provide redress for the victims and fit it within the ambit of direct discrimination under the SDA. The progress made in promoting equality and dignity at work was hindered by *Pearce v Governing Body of Mayfield Secondary School*,⁹² which unanimously held that the use of a comparator in a sex discrimination claim was inescapable.⁹³ In this case, the appellant was subjected to a sustained campaign of sexual harassment at work because she was a lesbian. The House of Lords rejected the outcome in *Porcelli* to the extent that it suggested that 'if the form of the harassment is sexual, that of itself constitutes less favourable treatment on the ground of sex'.⁹⁴ The House of Lords distinguished between the form and reason for the harassment and held that:

The fact that the harassment is gender specific in form cannot be regarded as of itself establishing conclusively that the reason for the harassment is gender based: 'on the ground of her sex'. It will certainly point in that direction... The gender specific form of the harassment will be evidence, whose weight will depend on the circumstances, that the reason for the harassment was the sex of the victim.⁹⁵

Lord Hope held that 'there is no escape, then, from the need to resort to a comparison'⁹⁶ and concluded that 'the finding is that the pupils would not have treated a hypothetical male teacher more favourably'.⁹⁷ Lord Scott conceded that 'the appellant suffered what could reasonably be described as sexual harassment'⁹⁸ and reasoned that:

[T]he 1975 Act is an Act to combat discrimination. It is not an Act to combat harassment.⁹⁹

⁹² [2003] UKHL 34.

⁹³ The House of Lords considered the sexual harassment claim under section 1(1)(a) of the SDA which provides that a person discriminates against a woman if 'on the ground of her sex he treats her less favorably than he treats or would treat a man'.

⁹⁴ *Pearce* supra (n92) at para 16.

⁹⁵ *Pearce* supra (n92) at para 17.

⁹⁶ *Pearce* supra (n92) at para 94.

⁹⁷ *Pearce* supra (n92) at para 95.

⁹⁸ *Pearce* supra (n92) at para 116.

⁹⁹ *Pearce* supra (n92) at para 117.

The House of Lords thus found that there was no discrimination on ground of sex because a hypothetical homosexual male comparator would have been similarly treated. Samuels has correctly criticized the outcome of *Pearce*¹⁰⁰ because it:

...places too much emphasis on the mindset of the harasser. This is unsound as discrimination law is supposed to focus on the objective reason for the conduct rather than the subjective intention behind it. Moreover, it is too easy for the harasser to argue that he is not discriminating against a woman because he would treat a man equally badly, albeit that the method of the harassment would be different, and therefore escape liability. This approach accepts anti-social behaviour that is generally understood to disadvantage women in the workplace.¹⁰¹

The effect of *Pearce*¹⁰² was thus to introduce the use of a comparator and made it more demanding to successfully prove sexual harassment in that the plaintiff had to prove not only that she suffered sexual harassment, but that she was treated less favourably than a similarly situated male comparator. The House of Lords thus failed to uphold the precepts of equality by insisting on the use of a fictitious comparator thereby diluting the harm suffered by marginalizing it in finding that the male comparator would have been similarly treated. The effect of this finding is to ignore the power imbalance and male dominance, which are at the core of sexual harassment thereby making it impractical for any woman to institute a successful sexual harassment claim under the SDA.

It is submitted that the principle established in *Pearce*¹⁰³ is two-fold: firstly, if an employer would harass both a man and a woman in the same way, then there is no unlawful discrimination (for instance, a pornographic display that both sexes find objectionable). Secondly, discrimination law requires less favourable treatment, so that if a man, like a woman, would *not* have endured the conduct, there is no gender discrimination. In South Africa, a contrasting factor, which compares treatment to a male, is not a prerequisite

¹⁰⁰ *Ibid.*

¹⁰¹ H Samuels 'A Feminist Perspective on the Law of Sexual Harassment' (2004) 12 *Feminist Legal Studies* 181 at 192.

¹⁰² *Supra* (n92).

¹⁰³ *Ibid.*

for a finding of gender discrimination because the Constitution and the EEA are so firmly grounded in principles of dignity and equity that this conclusion could be avoided. It is thus not necessary in South Africa to establish that a similarly situated male would have endured or put up with a similar treatment. It suffices in terms of the Constitution and EEA that women must establish a discriminatory treatment based on their gender.¹⁰⁴

It is submitted that difference on the basis of gender is what makes women a target of sexual harassment, which makes it improbable that a male comparator would have similarly received less favourable treatment. It is argued that the use of the male comparator is thus not to treat like with the like but compares the incomparable where no commonality exists. *Pearce*¹⁰⁵ is distinguishable in the South African context where the courts are duty bound in terms of section 39 of the Constitution, to develop common law and interpret legislation to accord with the precepts of the Constitution. The effect of the finding in *Pearce*¹⁰⁶ in the South African context would in all probability, have been challenged as unconstitutional in that it had the effect to perpetuate and institutionalize gender discrimination in violation of the values and fundamental rights entrenched in the Constitution.

Relief came when the SDA was amended in October 2005 to remove the use of a comparator by the introduction of a definition of sexual harassment in section 4A¹⁰⁷ of the SDA as follows:

- (1) For the purposes of this Act, a person subjects a woman to harassment if
 - (a) on the ground of her sex, he engages in unwanted conduct that has the purpose or effect
 - (i) of violating her dignity, or

¹⁰⁴ S 9 Constitution and s 6 EEA.

¹⁰⁵ *Supra* (n92).

¹⁰⁶ *Ibid.*

¹⁰⁷ The introduction of section 4A in the SDA was designed to implement the European Commission equal treatment directive 2002/73/EC of 23rd September 2002, requiring Member States specifically to outlaw sexual harassment. This led to the insertion of a specific definition of sexual harassment into the 1976 Equal Treatment Directive 76/207/EEC (see art 2 of directive 2002/73/EC) and provided for the 5th October 2005 as the final date for implementation by the Member States.

- (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her,
- (b) he engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that has the purpose or effect
 - (i) of violating her dignity, or
 - (ii) of creating an intimidating, hostile, degrading, humiliating or offensive environment for her, or
- (c) on the ground of her rejection of or submission to unwanted conduct of a kind mentioned in paragraph (a) or (b), he treats her less favourably than he would treat her had she not rejected, or submitted to, the conduct.

It is noteworthy from the above definition that section 4A of the SDA outlaws not only conduct 'of a sexual nature', but also the widespread discriminatory conduct which is rooted 'on the ground of sex'. The introduction of the specific offence of sexual harassment in the SDA will eliminate the need to squeeze sexual harassment within sex discrimination in the SDA, which was narrowly interpreted in *Pearce*¹⁰⁸ as necessitating the onerous use of a comparator. This is a victory in the fight against sexual harassment in the workplace and will elevate the protection of equality and dignity of workers in the workplace. It is submitted that the introduction of section 4A in the SDA has helped contextualize sexual harassment by acknowledging the characteristic features of the wrong; the attendant intolerable effect on the plaintiff; and the harm of the impairment of dignity inherent in sexual harassment.

4.7 Conclusion

It is concluded that sexual harassment is a case of gender discrimination in that it prejudices women and disrupts women's career advancement and progress in a way that men's careers are not disrupted. It is for these reasons that sexual harassment makes the 'employment experience as a whole more injurious, more stressful, more insecure, and less economically beneficial for women than for men, for reasons having nothing legitimately to do with the

¹⁰⁸ *Supra* (n92).

job or with women's performance'.¹⁰⁹ Sexual harassment is wrong as unfair discrimination and involves an impairment of dignity, which infringes the self-esteem, *ubuntu*, worth, and integrity of women as human beings; as citizens with guaranteed rights in the Constitution; and as workers with a right to free participation in the labour market.

¹⁰⁹ MacKinnon *op cit* (n3) 194.

Chapter Five – Personal Liability of the Employer for Sexual Harassment

5.1 Outline

A central theme of the thesis is that the future of the law on sexual harassment lies in the adoption of a multi-dimensional approach, which focuses on dignity/*ubuntu*. The essence of a multi-dimensional approach recognizes that the harm of sexual harassment gives rise to various remedies in delict, labour law, constitutional and criminal law which are not mutually exclusive and the plaintiff can use one or more of the available remedies, depending on which area of law the cause of action is grounded. At the heart of the proposed expansive approach, lies an emphasis on dignity/*ubuntu* in all the remedies because the harm of sexual harassment is first comprehended as being inimical to dignity/*ubuntu*, which is an essential pillar in the celebration of freedom, self-autonomy, and humanity in a democratic society.

The choice of the remedies depends on the jurisdiction of the court which is competent to adjudicate the matter; scope of protection; and maximum compensation and damages payable. Chapters five (personal liability of the employer), six (statutory vicarious liability), seven (*common-law* vicarious liability) and eight (jurisdiction) may be regarded as the heart of the thesis in that they explore statutory and common law rights and remedies which exist side by side in the context of sexual harassment as a case of unfair discrimination against employees. It is highlighted that the use of the term 'employer' in the thesis refers to a natural person or juristic person, whether an institution, corporation or governmental entity, 'who receives services from an employee or is assisted in the conduct of its business by an employee'.¹ Du Toit *et al* note that unlike the previous LRA, none of the

¹ D Du Toit, D Bosch, D Woolfrey, S Godfrey, C Cooper, GS Giles, C Bosch and J Rossouw *Labour Relations Law: A Comprehensive Guide* 5ed (2006) at 80.

labour statutes defines the term 'employer'.² In outlining remedies, comparative methods with other foreign jurisdictions will be used. Given the fact that the development of sexual harassment law in South Africa is still in its infancy, Thompson correctly highlighted that 'to arrive quickly at workable solutions on the full spectrum of labour law issues they [*the courts*] were virtually obliged to raid foreign systems'.³ It will be highlighted how the courts in South Africa made use of borrowing to effect legal reform that ensured the development of statutory and *common-law* remedies to sexual harassment and thereby enhanced the protection of constitutional rights violated by sexual harassment.

It is submitted that the use of comparative law in a similar context is not new in South Africa as Thompson has noted that comparative law has informed the courts a great deal on the development of South Africa's unfair labour practice jurisprudence and correctly suggested its innovative use as follows:

Firstly... Very often it was an idea rather than a doctrine (let alone a complete system) that was adopted. Provided the import had some minimum level of congruency with the local system, there was always a chance the court could be persuaded to adopt it. Secondly, the fact that a particular foreign legal rule had developed at all indicated that it embodied a workable proposition for at least certain environments. Foreign law, then, operated as a substitute for indigenous investigation of a more evidential nature on whether a practice was serviceable in economic terms. *With little adaptation, a functional equivalent of an otherwise alien notion could be construed* (my emphasis). Thirdly, and relatedly, at a time of great change and uncertainty, the identification of a foreign precedent reassured the court that it was not being asked to do something preposterous.⁴

This chapter deals with personal liability of the employer as one of the remedies available to the plaintiff. It is highlighted that personal liability arises by virtue of the employer's non-delegable duty of care because of the following:

² *Ibid.*

³ C Thompson 'Borrowing and Bending: The Development of South Africa's Unfair Labour Practice Jurisprudence' (1993) 6 *Int J Comp Lab Law Ind Relat* 183 at 204.

⁴ Thompson *op cit* (n3) 196.

- a) The entrenched rights and statutory obligations on the elimination of unfair labour practice, gender discrimination and promotion of equal participation in the workplace in terms of the EEA, LRA and the Constitution;
- b) The duty of care which exists in delict;
- c) The constitutional and *common-law* protection of dignity; and
- d) The duty of care to protect the welfare of the employee, which arises from the employment contract between the employer and the employee.

The victim of sexual harassment may thus proceed against the employer on grounds of both personal liability and vicarious liability of the employer based on the wrongful act committed by an employee.

5.2 Personal liability of the employer in delict

Guidance on what entails personal liability of the employer can be obtained from Weddle who has defined the substance of the non-delegable duty as follows:

A non-delegable duty is an affirmative duty of care that cannot be discharged merely by non-negligently delegating another person to perform the duty. Non-delegable duties are a function of a special relationship between the person who owes the duty and the one to whom the duty is owed. The duty, if breached, creates liability for the person who owes the duty (the employer), although it is the conduct of agents which breaches the duty.⁵

It is submitted that personal liability of the employer in delict is based on the existence of the *common-law* duty of care, which is owed by the employer to the employee. A finding of personal liability is distinguishable from statutory personal liability in terms of the EEA, which is based on the breach of statutory duties and obligations owed by the employer to the employee.

⁵ JS Weddle 'Title VII Sexual Harassment: Recognising an Employer's Non-delegable Duty to Prevent a Hostile Workplace' (1995) 95 *Colum L Rev* 724 at 743.

The employer's duty of care, which gives rise to personal liability of the employer, based on negligence, has its origins in the English law and was outlined in *Wilson & Clyde Coal Co Ltd v English*⁶ where Lord Wright held:

The obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment to employees, even though selected with due care and skill. The obligation is threefold, the provision of a competent staff of men, adequate material, and a proper system and effective supervision.

Lord Maugham added to the above remarks on the nature of employer's personal negligence and held as follows:

In these cases, it was held that it was contrary to all probability to assert, or to assume, that the employee contracted on the basis that he was aware of risks in respect of these matters, or that he impliedly agreed to take them upon himself.⁷

The duty of care means that the employer 'owes a personal obligation to the employee that reasonable care will be exercised to provide safety in employment'.⁸ Therefore, 'an unsafe workplace due to careless acts and faults of his own marks the beginning but not the end of employer's liability'.⁹ It is emphasized that the nature of the employer's obligation and duty of care is personal to the employer and if not discharged gives rise to the employer's own personal negligence. This is distinct from no-fault, strict liability in terms of vicarious liability.

In *Wilson & Clyde Coal Co Ltd v English*¹⁰ the court outlined the nature of the employer's non-delegable duty of care as follows:

The true question is what is the extent of the duty attaching to the employer? Such a duty is the employer's personal duty, whether he performs, or can perform, it himself, or whether he does not perform it, or cannot perform it, save by servants or agents. A failure to perform such a duty is the employer's personal negligence...

It is observed that in English law, the employer's non-delegable duty is linked to its *common-law* duty of care to ensure the safety of its employees and a safe working environment. Breach of this *common-law* duty renders the employer personally liable. Fleming states the employer's non-delegable *common-law* duty in English law as follows:

⁶ [1937] 3 All ER 628 at 640.

⁷ *Supra* (n6) at 645.

⁸ HH Glass, MH McHugh and FM Douglas *The Liability of Employers in Damages for Personal Injury* 2ed (1979) at 5.

⁹ *Ibid.*

¹⁰ *Supra* (n6) at 646.

Today it is well established that an employer, besides being vicariously liable for the causal negligence of his servants toward one another, also owes an overriding managerial responsibility to safeguard them from unreasonable risks of personal injury in regard to the fundamental conditions of employment – the safety of plant, premises and method of work.¹¹

It is argued that the duty to ensure the safety of employees and a safe working environment includes ensuring that the workplace is not polluted by sexual harassment since sexual harassment not only violates gender equality and dignity, but also affects the safety of the employees because it inflicts psychological harm on them. It is for this reason that the Supreme Court of Appeal in *Media 24 Limited, Gasant Samuels v Sonja Grobler*¹² extended the employer's duty to protect the employee from physical harm caused by physical hazards to cover the duty to protect the psychological welfare of the employee.

The nature of loss covered under personal liability of the employer is broader in that a finding of negligence on the part of the employer renders him liable for the economic loss, physical consequences, and psychological harm suffered by the plaintiff. Sentimental loss would fall under the *actio iniuriarum* and be based on intention not negligence. It must be noted that if the claim is brought under the *common-law*, then the *common-law* principles would have to be satisfied.

Grobler (SCA)¹³ established that the employer is under duty of care by virtue of the legal convictions of the community, which require an employer to take reasonable steps to prevent sexual harassment of its employees in the workplace and to compensate the plaintiff for harm, should it negligently fail to do so. The effect of this finding widened the net of the employer duties and personal liability. The duty of care is imposed on the employer independent of the existence of the contract of employment or statutory remedy in section

¹¹ JG Fleming *The Law of Torts* 9ed (1998) at 559-60.

¹² [2005] 7 BLLR 649 (SCA) at para 65.

¹³ *Supra* (n12) at para 68.

60 of the EEA.¹⁴ The delictual and contractual rights exist side by side and the employer must satisfy the requirements of delictual liability for sexual harassment independent of the contract of employment (contractual liability). At *common-law*, however, there can be no employment relationship, and therefore no employer liability, but for 'the existence of the contract of employment'.

In the English case of *McDermid v Nash Dredging Ltd*,¹⁵ the court considered an issue of a non-delegable basic personal duty of the employer to take reasonable care to conduct its operations as not to subject those employed by him to unnecessary risk. The court held that the employer was personally liable for its neglect, not on a vicarious basis, but because the agent's omission to adopt a safe working environment is a breach of the employer's duty. The important principle developed in *McDermid*,¹⁶ which is of relevance to South Africa is that preventing sexual harassment is within the responsibility of the employer and the employer has a non-delegable duty to ensure a sound and safe working environment, which is free from hostility and sexual harassment. The employer cannot turn a blind eye to sexual harassment with the hope that responsibility and liability will vest on its supervisors thereby totally exonerating itself from the duty to eliminate gender discrimination in the workplace.

In South Africa, the EEA is also instructive in setting out what is expected of the employer to discharge its duty of care in ensuring compliance with the statutory prohibition against unfair discrimination in the workplace. An employer is duty-bound in terms of section 60 of the EEA to be pro-active and take measures to prevent, not to merely correct and be reactive to sexual harassment as and when it occurs. Bernstein¹⁷ provides guidance on the scope of the employer's non-delegable duty to prevent and remedy sexual

¹⁴ *Supra* (n12) at para 70.

¹⁵ [1986] All ER 676.

¹⁶ *Ibid.*

¹⁷ A Bernstein 'Treating Sexual Harassment with Respect' (1997) 111 *Harv L Rev* 445 at 495.

harassment in terms of section 60 of the EEA, in that 'the employer must be seen as an agent as well as a principal; its responsibilities direct and non-delegable arise from its own obligations not to promote or condone a hostile environment'.

In *Waters v Commissioner of Police of the Metropolis*¹⁸ the court held that the employer is under a *common-law* duty to protect an employee against victimisation and harassment which causes physical or psychiatric injury - apart from statutory obligations or contract of employment. W was raped and buggered by a fellow officer in her police residential accommodation when they were both off duty. She complained about the attack but claimed that no proper investigation had taken place. Instead, she was ostracised, harassed, victimised and threatened because of lodging a complaint, and had suffered psychiatric injury as a result.

W brought an action against the police commissioner for negligent failing to deal with her complaint and allowing a campaign of harassment by other officers. The court held that the plaintiff is entitled to recover damages if she is able to establish that the negligence of the defendant caused her to suffer injury. The court made a curious observation, (which distinguishes this case from *K v Minister of Safety and Security*¹⁹ where the Constitutional Court held that the policemen were under a general duty to protect the public) that in any event the plaintiff was not suing as a member of the public but as someone in an 'employment' relationship with the respondent.²⁰

Accordingly, the court held that the commissioner's breach of personal duty, although those engaged in performing his duty did the acts, was not one, which plainly and obviously had to fail, and the appeal was thus allowed. It is interesting to note that the court did not touch on the occurrence of rape in dealing with the breach of duty of care but merely dealt with the

¹⁸ [2000] 1 WLR 1607 (HL) at 1616.

¹⁹ [2005] 8 BLLR 749 (CC).

²⁰ *Supra* (n18) at 1614.

failure on the part of the employer to protect the plaintiff against the risk of harm of retaliation after she had lodged the complaint. The court indicated that it would not have reached a similar conclusion had the plaintiff been a member of public. The court highlighted the proximity of relationship between the employer and employee in finding grounds to establish an existence of a duty of care and negligence on the part of the employer. The court reasoned that breach of duty would be present if the employer fails in its duty where he knows or could foresee that sexual harassment would occur, and fails to take steps to correct it when it is in its power to do so.²¹

The court added that the breach of employer's duty will also be present where the employee has complained but the employer does not take steps to protect the employee when he could foresee a retaliatory conduct ensuing.²² It is argued that this fact will be relevant in constructive dismissal cases where an employer turns a blind eye to complaints of sexual harassment and fails to offer reasonable support which eventually leads the victim to resign as a result of a hostile environment ensuing. It is submitted that the employer often delegates the performance of its duties to its agents. This duty remains in the province of the employer to be carried out and fulfilled whether or not it is delegated to an agent. Weddle has rightly noted that the courts and commentators have overlooked the principle of employer's non-delegable duties.²³ The principle of employer's non-delegable duty 'imputes the acts or omissions of agents to the employer, but also considers whether those acts, taken together, breach the employer's, rather than the agent's duty'.²⁴

In South Africa, the negligence standard is sufficient to find personal liability on the part of the employer. The South African authors Neethling, Potgieter and Visser²⁵ state that the criterion is 'whether the reasonable person

²¹ *Supra* (n18) at 1612.

²² *Ibid.*

²³ Weddle *op cit* (n5) 743.

²⁴ *Ibid.*

²⁵ J Neethling, JM Potgieter and PJ Visser *Law of Delict* 5ed (2006) at 137.

in the position of the defendant would have foreseen that his conduct might cause damage to the plaintiff'. In establishing a breach of duty of care in South Africa, 'the court considers whether the wrongdoer exercised the standard of care that the reasonable person would have exercised in order to prevent damage'.²⁶ In other words, the enquiry is whether the employer failed to take reasonable care to prevent damage and ensure elimination of unfair discrimination in the workplace. South African law is comparable to the approach of the English writers on negligence who assert that an enquiry on the breach of duty of care by the employer involves an examination of four issues:

- a) That there was a risk of injury which was reasonably foreseeable. (The foreseeability issue.)
- b) That there were reasonably practicable means of obviating such risk. (The preventability issue.)
- c) That the plaintiff's injury belonged to the class of injuries to which the risk exposed him. (The causation issue.)
- d) That the defendant's failure to eliminate the risk showed a want of reasonable care for the plaintiff's safety. (The issue of reasonableness.)²⁷

Neethling, Potgieter and Visser have summarised the English approach to establish employer's breach of duty of care as being two fold - that is to say, one must establish 'whether the defendant owed the plaintiff a duty of care (the 'duty-issue'); and thereafter whether there was a breach of this duty (the 'negligence-issue')' and negligence is present 'if both questions are answered in the affirmative'.²⁸

Section 60 of the EEA is an extension of a delictual duty of care. Breach of this duty thus makes the employer personally liable for breach of both the letter and spirit of the EEA, which promotes equality and fair treatment in the workplace, and for breach of its non-delegable duty to ensure a working environment free from harassment, indignity, and unfair discrimination. The principle of the employer's non-delegable duty to ensure a non-

²⁶ *Ibid.*

²⁷ Glass *et al op cit* (n8) 16.

²⁸ Neethling *et al op cit* (n25) 137.

discriminatory environment is also echoed in the 2005 Code which states that employers are duty bound to 'create and maintain a working environment in which the dignity of employees is respected'.²⁹ Breach of this duty does not make the employer vicariously liable but makes him personally liable since the nature of the duty makes the employer personally responsible to ensure compliance thereof.

In *J v M*³⁰ the court also highlighted sexual harassment as a form of misconduct and thus recognized a non-delegable duty on the part of the employer to ensure that its employees are not subjected to this form of misconduct in the workplace and held as follows:

Sexual harassment, depending on the form it takes, will violate that right to integrity of body and personality which belongs to every person and which is protected in our legal system both criminally and civilly. An employer undoubtedly has a duty to ensure that its employees are not subjected to this form of violation within the workplace... It creates an intimidating, hostile and offensive work environment...An employer clearly has an interest in ensuring a happy work environment as that leads to higher productivity. An employer has a further interest in stopping sexual harassment.

The courts tend to place too much emphasis on vicarious liability and neglect to underscore the basis of personal liability of the employer for sexual harassment. It is submitted that there is potential scope for personal liability of the employer in South Africa because section 60(2) of the EEA imposes a regulatory burden on the employer to take all necessary steps to eliminate discriminatory practices in the workplace. The advantage with personal liability is that it focuses on the conduct of the employer and its negligent failure to take reasonable steps to remedy and prevent sexual harassment. Unlike vicarious liability, personal liability of the employer is thus not based on its agent's negligent discharge of its duties within the scope of employment.

²⁹ Item 6 2005 Code.

³⁰ (1989) 10 ILJ 755 (IC) at 757I-8E.

In *Ntsabo v Real Security CC*³¹ the employer was found personally liable, in that the respondent did or 'at best ought to have foreseen the development of hostile and intolerable working environment' as a result of inaction to rectify the situation after Ntsabo had lodged a complaint. The conclusion of the court in finding the employer both vicariously and personally liable will not confuse the principles of vicarious and personal liability, which are two distinct areas of law. The court finding is consistent with section 60 of EEA which contains a form of deemed fault on the part of the employer in that the employer is found liable for its culpable failure to remedy sexual harassment once it has come to its attention, in which case the perpetrator's gender discrimination will be deemed to be the employer's gender discrimination.³²

Section 4 of the EEA states that, the prohibition of unfair discrimination provisions applies to 'all employees and employers'. This creates scope for both personal liability on the part of the employer, as well as *statutory* vicarious liability of the employer in terms of section 60 of the EEA for wrongful acts committed by its employees. For the employer, 'fighting the belief that "this is no place for woman" is a must to deal properly with sexual harassment'.³³ The *common-law* duty of care and section 60(2) of the EEA also enjoin the employer to take all necessary steps to eliminate discriminatory practices in the workplace.

5.2 Delictual remedy under the *actio iniuriarum*

An alternative remedy for sexual harassment is a delictual remedy available under the Roman Dutch law *actio iniuriarum*, which is founded on the

³¹ [2004] 1 BLLR 58 (LC) at 93. This is consistent with United States Court of Appeals judgment in *Burlington Industries Inc v Ellerth* 524 US 742 (1998) at 759, where the court held that direct liability on the part of the employer will ensue with respect to sexual harassment 'if it knew or should have known about the conduct and failed to stop it.'

³² See ch 6.2 on the discussion of *statutory* vicarious liability in terms of section 60 of the EEA.

³³ D Orlov and MT Roumell *What Every Manager Needs to Know about Sexual Harassment* (1999) at 79.

protection of human dignity, entrenched in the Constitution.³⁴ The basis underlying the delict of dignitary harm is that it 'injures "personality interests" rather than one's physical well-being'.³⁵ The concept and nature of dignitary harm as an infringement on the victim's personality rights in the context of sexual harassment, making it intolerable and unwelcome behaviour, was correctly summarised by Ehrenreich:

[A]ll individuals share in 'personhood', are autonomous and unique, and are entitled to be treated with respect. Actions that would humiliate, torment, intimidate, pressure, demean, frighten, outrage, or injure a reasonable person are actions that can be said to injure an individual's dignitary interests and, if sufficiently severe, can give rise to causes in tort.³⁶

Ehrenreich's view that conduct is injurious if it would have impaired a reasonable person's dignitary interests is consistent with the objective test of impairment of dignity as enunciated in *De Lange v Costa*.³⁷

The 2005 Code states that the impact of sexual conduct should constitute an impairment of the employee's dignity taking into account the circumstances of the employee and the respective positions of the employee and the perpetrator in the workplace.³⁸ The factors outlined by the 2005 Code which should be taken into account when assessing whether the impact of conduct amounted to impairment of dignity, suggest an objective criteria. The 2005 Code thus recognizes potential scope for a civil action of the *actio iniuriarum* against the employer. The impairment of dignity as outlined in the 2005 Code can be understood to mean that guidance on what constitutes 'impairment of dignity' may be determined according to the principles of the *actio iniuriarum*.

³⁴ S 10 Constitution.

³⁵ R Ehrenreich 'Dignity and Discrimination: Towards a Pluralistic Understanding of Workplace Harassment' (1999) 88 *Geo LJ* 1 at 22.

³⁶ *Ibid.*

³⁷ 1989 (2) SA 857 (A).

³⁸ Item 5.4 2005 Code.

The right to dignity 'embraces only the *subjective feeling of dignity* or self-respect or the personal sense of self-worth: person's pride in his own moral value'.³⁹ Melius De Villiers identified the nature of dignity to be defined as:

that valued and serene condition in his social or individual life which is violated when a person is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt.⁴⁰

In order to found a successful action for damages for impairment of dignity, there must be:

- a) an unlawful,
- b) Impairment of dignity, perpetrated with
- c) *Animus iniuriandi*.⁴¹

Once the plaintiff proves impairment of dignity, then an inference of unlawfulness and an inference of *animus iniuriandi* arise.

5.2.1 Impairment of dignity

The impairment of dignity is central to the harm of sexual harassment and consists of insulting and offending that person.⁴² This can be understood in the context as laid out by Burchell⁴³ who states that dignity can be described positively as a person's right to 'self-respect, mental tranquillity and privacy' and negatively, as a 'person's right to freedom from insulting, degrading, offensive or humiliating treatment and to freedom from invasion of privacy'.

³⁹ J Neethling, JM Potgieter and PJ Visser *Neethling's Law of Personality* 2ed (2005) at 28.

⁴⁰ J Burchell and J Milton *Principles of Criminal Law* 3ed (2005) at 746 citing M De Villiers *The Roman and the Roman Dutch Law of Injuries* (1989) 24. See also *Matthews and others v Young* 1922 AD 492 and *R v Umfaan* 1908 TS 62 on what the impairment of dignity entails.

⁴¹ J Burchell *Personality Rights and Freedom of Expression* (1998) at 327. See also *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) and 1999 (1) BCLR 1 (SCA) - negligence is not sufficient for the *actio iniuriarum* except for defamation by the media where failure to observe due care and caution must be satisfied.

⁴² In the United Kingdom, the court in *Reed and Bull Information Systems Ltd v Stedman* (1999) IRLR 299 EAT also viewed sexual harassment as being an infringement of a human right to dignity and held that a characteristic feature of sexual harassment is that it undermines the victim's dignity at work and creates an 'offensive' or 'hostile' environment for the victim and an arbitrary barrier to sexual equality in the workplace.

⁴³ Burchell and Milton *op cit* (n40) 748.

In *PSA obo Ferreira and Another v Department of Labour*⁴⁴ the arbitrator recognized sexual harassment as a violation of dignity which 'constitutes a grave disrespect for another human being and as such is a very serious form of misconduct'. The arbitrator held that considering the case law on sexual harassment and the gravity of the applicants' conduct, the respondent had a valid and fair reason for a dismissal and found that their dismissal was substantively fair. The arbitrator also found that their dismissal was procedurally unfair because the lengthy delay in convening disciplinary hearing and in informing employee of outcome was inherently prejudicial and unfair. Nevertheless, the arbitrator found the applicants to be 'architects of their own misfortune'⁴⁵ and declined to award compensation for procedural unfairness. The arbitrator sent a strong message and held as follows:

Every man and woman, including those with a sexually active background, still has the right to accept some advances and to reject others; it is every person's right to make that choice. To think or expect otherwise is disrespectful and goes against the grain of basic decency.⁴⁶

The arbitrator found that they breached the element of trust in that they could no longer be trusted in the company of the victim or of other female employees. It is argued that sexual harassment is unethical and poisons the workplace to a point where it is not in the interests of either business or female colleagues to be in the company of an untrustworthy harasser who fails to treat his colleagues with respect, integrity, and dignity. A constructive principle developed from this case is that sexual harassment is indecent and disrespectful behaviour, which can constitute an offence warranting dismissal.

It is emphasized that the right to accept or reject sexual advances amounts to a manifestation of individual autonomy, which is an integral facet of dignity or privacy. Furthermore, the wrong of sexual harassment

⁴⁴ [2004] 8 BALR 1001 (GPSSBC) at 1012.

⁴⁵ *Ibid.*

⁴⁶ *Supra* (n44) at 1010-11.

disrespects the plaintiff's freedom of choice to choose whom she wants to be intimate with, and violates the plaintiff's autonomy and personhood, which are integral to 'dignity'. It is observed that the *PSA*⁴⁷ case really captures an essential part of this thesis - that is to say, that sexual harassment essentially involves an impairment of dignity (that is to say, self-esteem, self-worth, respect, *ubuntu* and individual autonomy) and equality from a positive aspect; and freedom from insult, degrading treatment, disrespect, abuse of trust and unfair discrimination from a negative aspect. The concept of '*ubuntu*' is:

a metaphor that describes the significance of group solidarity, on survival issues, that is so central to the survival of African communities, which as a result of the poverty and deprivation, have to survive through brotherly group care and not individual self-reliance.⁴⁸

It is argued that dignity overlaps with '*ubuntu*',⁴⁹ which includes treating a person as a human being with respect and integrity. *Ubuntu* is broader than the concept of dignity in that 'personal dignity is one of the most important principles of *ubuntu*'⁵⁰ and 'in its most fundamental sense it stands for personhood and morality'.⁵¹ A distinguishing feature between 'dignity' and '*ubuntu*' is an element of African humanism in *ubuntu* whereby an individual does not exist in vacuum, but co-exists with other human beings thereby promoting tolerance and mutual respect. Therefore, *ubuntu* is a building block, which is essential in cementing human relationships in the workplace. The concept of *ubuntu* can also be understood in the light of the Constitution whereby human rights, interests, and abilities of women are celebrated and respected.

Ubuntu has been defined to mean:

1. *Ubuntu* is the humanistic experience of treating all people with respect, granting them their human dignity.

⁴⁷ *Ibid.*

⁴⁸ L Mbigi and J Maree *Ubuntu: The Spirit of African Transformation Management* (2005) at 1.

⁴⁹ South African Concise Oxford Dictionary (2002) - '*Ubuntu*' is a spirit of fellowship, humanity, and compassion, especially as associated with African society.

⁵⁰ MJ Bhengu *Ubuntu: The Essence of Democracy* (1996) at 18.

⁵¹ Mbigi and Maree *op cit* (n48) 1.

2. Ubuntu means humanness. Being human encompasses values like universal brotherhood for Africans, sharing, treating and respecting other people as human beings.
3. Ubuntu is humanism. It is a belief in the centrality, sacredness, and foremost priority of the human being in all our conduct, throughout our lives.⁵²

It is highlighted that sexual harassment negates the essence of '*ubuntu*' which entails treating women with respect and humanity; and as equal fellow participants in the labour market deserving of an equal opportunity to realize their career objectives in the workplace. The emphasis on '*ubuntu*' in the context of sexual harassment is the absence of discrimination, indignity, and inequality in the workplace and underscores promoting morality ('harassment free' environment) and treating women as co-workers, equals, and fellow human beings.

The essence of *ubuntu* thus involves enabling women to live life to the fullest as free individuals capable of making their own choices of intimate partners and capable of being masters of their own career paths and career success - unhindered by obstacles of gender discrimination in the workplace. When women are treated with *ubuntu*, the employer will benefit through collaborative teamwork between men and women in the workplace, and women will be able to reach their utmost potential and productivity beyond the boundaries imposed by gender discrimination.

A central focus of *ubuntu* in eradicating sexual harassment in the workplace is that it promotes 'wellbeing'; humanity; integrity; consideration; unity; selflessness; respect; and moral norms and values. Mokgoro J in *S v Makwanyane* gave content to the concept of '*ubuntu*' and defined it as follows:

Generally, *ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality.⁵³

⁵² Bhengu *op cit* (n50) 5.

⁵³ [1995] 6 BCLR 665 (CC) at 772. See also *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) at para 68 in the context of a recent defamation case where Mokgoro J held that 'in our constitutional

It follows therefore that sexual harassment is an impairment of liberty and is inimical to the value of dignity against which the Constitution is premised. It is thus unlikely that a limitation clause contained in section 36 of the Constitution⁵⁴ will be 'reasonable' and 'justifiable' in the context of sexual harassment given the attendant encroachment on *ubuntu*, dignity and gender equality which involves a complete negation of dignity and not mere limitation thereof. It is highlighted that despite the importance of dignity as a right, a constitutional founding value and a value to be taken into account in applying the limitation clause, the right to dignity is 'not absolute and section 36 of the Bill of Rights recognizes that it may be limited in appropriate circumstances'.⁵⁵ Similarly, in delict the concept of dignity is qualified by the concept of 'reasonableness' when dealing with the objective test of dignity outlined in *De Lange*.⁵⁶

The subjective appreciation of the harm is relevant to the judiciary enquiry of the impairment of dignity before evaluating it within objective limits. Burchell⁵⁷ has suggested in the case of impairment of dignity, that unless the subjective impairment is experienced and established, it is highly unlikely that a case of impairment of dignity will result in litigation. This means that the subjective element must first be established and then it must

democracy the basic constitutional value of human dignity relates closely to *ubuntu* or *botho*, an idea based on deep respect for the humanity of another'. Sachs J at paras 113-6 also highlighted the unifying factor of *ubuntu* as 'representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values'.

⁵⁴ The limitation clause in section 36(1) of the Constitution reads:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

See also ch 5.3 on the discussion of constitutional protection of dignity.

⁵⁵ Nugent JA at para 28, in *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (2) BCLR 120 (SCA).

⁵⁶ *Supra* (n37).

⁵⁷ Burchell *op cit* (n41) 331.

be assessed whether a person of ordinary sensibilities would have been similarly been offended by such conduct.

The hybrid test, which consists of subjective (plaintiff's subjective appreciation of the harm) and objective (court's impartial enquiry into the harm) assessment of the infringement of dignity was developed in *De Lange*⁵⁸ where Smallberger JA summarised the law as follows:

Because proof that the subjective feelings of an individual have been wounded, and his *dignitas* thereby impaired, is necessary before an action for damages for *iniuria* can succeed, the concept of *dignitas* is a subjective one. But before that stage is reached it is necessary to establish that there was a wrongful act... In determining whether or not the act complained of is wrongful, the Court applies the criterion of reasonableness - the 'algemene redelikhedsmaatstaf'... This is an objective test. It requires the conduct complained of to be tested against the prevailing norms of society (i.e. the current values and thinking of the community) in order to determine whether such conduct can be classified as wrongful. To address the words to another which would wound his self-esteem but which are not, objectively determined, insulting (and therefore wrongful) cannot give rise to an action for *iniuria*... For words to be injurious they must infringe one of the 'absolute rights of personality'.

Viewed this way, *De Lange*⁵⁹ is consistent with the 'reasonable person in the position of the victim'⁶⁰ test whereby the objectionable conduct, taking into account the *boni mores* of the community viewed against the backdrop of the Constitution, must be such that it would have offended a reasonable person in the same position as the victim. Similarly in *Sokhulu v New Africa Publications Ltd and others*,⁶¹ Goldstein J applied *De Lange v Costa* rule and held that there cannot be an impairment of *dignitas* without unlawfulness and the question whether this requirement is satisfied or not is an objective one answered against the backdrop of the Constitution, by having regard to the prevailing norms of society.

⁵⁸ *Supra* (n37) at 862A-G. The High Court in *Dendy v University of Witwatersrand, Johannesburg and others* [2005] 2 All SA 490 (W) at para 29, took the view that the *De Lange v Costa* hybrid test which consists of a subjective and objective assessment of infringement of dignity, was consistent with the Constitution.

⁵⁹ *Ibid.*

⁶⁰ See ch 3.5 on the discussion of the reasonable person in the position of the victim test.

⁶¹ 2001 (4) SA 1357 (W) at 1360.

MacKinnon⁶² echoes similar sentiments and suggests a standard of whether the 'conduct would have been offensive to the person of ordinary sensibilities'. She further states that if it would have been, then the employer is 'liable for all damages caused to this individual, whether she is unduly sensitive or not'.⁶³ The objective test thus serves to ensure that frivolous actions are not brought before the court where the conduct complained of, is neutral and therefore not wrongful and cannot under any circumstances convey an injurious or insulting signification.⁶⁴

In *Harris v Forklift Systems Inc*⁶⁵ the Supreme Court of the United States adopted a subjective and objective hybrid test and summed up its judicial enquiry as follows:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment-an environment that a reasonable person would find hostile or abusive-is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

It is submitted that these United States cases of abusive environment where the test is both subjective (personal effect on the plaintiff) and objective (factual, impartial and unbiased judicial enquiry) can be used as an analogous support for the same approach to dignity in South Africa. This is so because hostile work environment also constitutes impairment of dignity. However, hostile work environment is a narrower concept than 'dignity'. In South Africa, the test of dignity includes an important objective element, which should be satisfied - that is to say, objectively determined the conduct complained of must be insulting and therefore wrongful.⁶⁶

⁶² CA MacKinnon *Sexual Harassment of Working Women: A Case of Sexual Discrimination* (1979) at 167.

⁶³ *Ibid.*

⁶⁴ The objective aspect of the hybrid test to impairment of dignity was applied in *Matiwane v Cecil Nathan, Beattie & Co* 1972 (1) SA 222 (N) where Milne J found that the letter to the plaintiff used a language and expressed sentiments likely to humiliate an ordinary reasonable man and that the letter in question was insulting and subjected the plaintiff to ignominious treatment.

⁶⁵ 510 US 17 (1993) at 21-2.

⁶⁶ *De Lange supra* (n37).

It is established that the delictual criterion for sexual harassment is ultimately objective. The labour law test for sexual harassment is subjective in that 'impact of the sexual conduct on the employee' is one of the factors to be taken into account.⁶⁷ The subjective criterion is further qualified by an objective criterion, which stipulates that when assessing the impact of conduct, it should amount to an impairment of the employee's dignity taking into account the following factors:

- a) the circumstances of the employee; and
- b) the respective positions of the employee and the perpetrator in the workplace.⁶⁸

Burchell⁶⁹ opines that the law must cap the potential flood of litigation especially 'in the sphere of employment, where a mere tactful letter, which contains valid reasons for dismissal, may be the only way of performing the unenviable task of terminating services'. He rightly cautions that:

[I]f a wholly subjective test of dignity is applied in the law of delict, then any hypersensitive person who feels insulted by the statement, which would not insult a person of ordinary sensibilities, would be able to recover damages.⁷⁰

This view concurs with the approach adopted in *Ndamse v University College of Fort Hare*⁷¹ where Munnik J, on an issue of breach of contract reasoned that a wrongful dismissal or suspension is not per se an *iniuria* for which damages other than damages flowing from the breach of contract can be claimed. The court went on to acknowledge that the manner of a wrongful dismissal may constitute *iniuria*, in which case the plaintiff must set out facts, other than mere fact of dismissal, which constitutes *iniuria*.⁷² It is submitted that an impairment of dignity is wide enough to include procedural unfairness because of the unfair labour practice even though the plaintiff suffered no economic loss. An impairment of dignity can thus arise where the dismissal was procedurally unfair flowing from the 'the employer's failure to

⁶⁷ Items 4 and 5.4 2005 Code.

⁶⁸ Item 5.4 2005 Code.

⁶⁹ JM Burchell 'Dignitas - Subjective or Objective' (1977) 94 SALJ 5 at 7.

⁷⁰ *Ibid.*

⁷¹ 1966 (4) SA 137 (E) at 139.

⁷² *Ibid.*

afford him an opportunity to be heard'⁷³ and 'by reason of the manner in which his dismissal was effectuated'.⁷⁴

This view is compatible with the finding in *Walker v Van Wezel*⁷⁵ where Ramsbottom J held that the 'communication itself must be of an insulting or offensive nature, and by addressing those words to the plaintiff the defendant must be subjecting him to ignominious, offensive, or degrading treatment'. The court went on to caution that when frivolous actions are brought because of words, which cannot under any circumstances convey an injurious signification it is the duty of the courts to put a stop to the action.⁷⁶

Bernstein advocates a judicial test of a respectful person in sexual harassment cases, which describes sexual harassment 'as a type of incivility' or 'disrespect'⁷⁷ and defines respect as a 'sense of recognition of a person's inherent worth', which is 'owed to all persons'.⁷⁸ It is highlighted that Bernstein proposition is informative in the context of dignity, which entails the right to be treated with respect. The use of the respectful standard in sexual harassment cases is instructive in giving the content to the ideal of equality behind the EEA as well as 'the ideal of individual autonomy behind dignitary-tort law'.⁷⁹ In other words, respect is about treating people with *ubuntu*, dignity, equal respect, worth and esteem. It is for this reason that the harm of sexual harassment strikes at heart of equality, women's dignity, worth and esteem.

The words or conduct must be material to ground wrongfulness and the effect thereof must be such that it conveys an injurious and offensive substance. In summary, firstly – the conduct under review must be subjectively insulting and offensive taking into account the plaintiff's

⁷³ *Sibiya v NUM* [1996] 6 BLLR 794 (IC) at 804.

⁷⁴ *Buthlezi v Municipal Demarcation Board* [2005] 2 BLLR 115 (LAC) at 117.

⁷⁵ 1940 WLD 66 at 71.

⁷⁶ *Ibid.*

⁷⁷ Bernstein *op cit* (n17) 450.

⁷⁸ Bernstein *op cit* (n17) 452.

⁷⁹ Bernstein *op cit* (n17) 450.

perspective. Secondly, the plaintiff's subjective perspective must be assessed objectively to determine whether the conduct complained of is insulting and in conflict with the court's conception of 'contemporary *boni mores*'.⁸⁰ Thirdly, the conduct complained of must be '*prima facie* wrongful'.⁸¹ Another aggravating factor in establishing unlawfulness in the impairment of dignity flowing from the harm of sexual harassment is the fact that sexual advances 'made by a supervisor to a subordinate and/or were made on a persistent basis'.⁸² It is submitted that supervisory harassment is more injurious because it is linked to a tangible employment action and involves abuse of trust and organizational power.

5.2.2 *Animus iniuriandi*

Animus iniuriandi must be established in order to ground a successful action for *iniuria*. There must be intention to impair dignity. The intention must be actual or legal intention in the form of *dolus eventualis* in that the defendant must have either known that such infringement is wrongful or foreseen the consequences of his conduct - that is to say, might unlawfully impair the plaintiff's dignity.⁸³ *Animus iniuriandi* 'is presumed to exist as soon as the wrongfulness of the insulting conduct has been proved'.⁸⁴

In terms of the 2005 Code, the focus is on the recipient of the wrongful conduct. It is submitted that the irrelevance of state of mind means that the delictual defence of absence of *animus iniuriandi* negating intention to inflict harm, is absent in labour law. In *Jackson v National Institute for Crime Prevention and Rehabilitation of Offenders*⁸⁵ Jansen JA held that the distinction between innocent words and *per se* injurious 'rest upon some objective

⁸⁰ Burchell and Milton *op cit* (n40) 754.

⁸¹ Neethling *et al op cit* (n39) 195.

⁸² Burchell *supra* (n41) 336.

⁸³ Burchell and Milton *op cit* (n40) 757. *De Lange supra* (n37) at 861C-D.

⁸⁴ Neethling *et al op cit* (n39) 197.

⁸⁵ 1976 (3) SA 1 (A) at 13.

standard to enable an inference of *animus iniuriandi* to be drawn'. The court thus held that the:

use of words not injurious (objectively considered), even if they in fact violate a plaintiff's subjective feelings, could hardly, by itself, provide any basis for inferring *animus iniuriandi* on the part of the speaker or writer.⁸⁶

The court reasoned that the facts did not disclose presence of *animus iniuriandi* on the part of the defendant and that objectively, the words communicated by the defendant did no more than convey to the plaintiff that the defendant is anxious not to leave any stain on her record and offered her instead, a chance of resigning.⁸⁷ It is submitted that if the conduct or words were not insulting objectively assessed, it follows therefore that no inference of *animus iniuriandi* can be drawn. It is established that the test of *animus iniuriandi* is subjective but the inference can be drawn from objective facts and circumstances. *Animus iniuriandi* is thus a distinguishing factor between a claim for impairment of dignity in delict and under section 50(2)(b) of the EEA - where fault is not part of the enquiry when claiming payment of damages for impairment of dignity. It is concluded that it is more demanding to claim impairment for dignity under the *actio iniuriarum* than in terms of section 50(2)(b) of the EEA - even though payment of damages for impairment of dignity is not capped in both delict and the EEA.

In short therefore, *animus iniuriandi* means that the defendant either directs his will to infringe the plaintiff's feelings of dignity (in other words, to insult her) in the knowledge that such infringement is (possibly) wrongful.⁸⁸ It is argued that this means that it is sufficient that the defendant possesses *dolus eventualis*, which is foresight of the possibility of unlawfulness of his conduct. It follows that if 'direction of the will or consciousness of wrongfulness is absent, intention is lacking' and the court will dismiss the action for *iniuria*.⁸⁹

⁸⁶ *Ibid.*

⁸⁷ *Jackson supra* (n85) at 14.

⁸⁸ *Neethling et al op cit* (n39) 197.

⁸⁹ *Ibid.*

Most importantly, *animus iniuriandi* can be inferred from objective circumstances.⁹⁰

5.2.3 Defences to rebut *animus iniuriandi*

Defences are available to rebut presence of *animus iniuriandi* on the following grounds:

- (i) Mistake, or
- (ii) Jest

(i) Mistake

If the defendant is under a *bona fide* mistaken impression that his conduct is lawful, then he lacks '*consciousness of wrongfulness*, an essential part of intent – and therefore also intent – is absent as a result of this *mistake*'.⁹¹

(ii) Jest

The defendant can rebut the presumption of *animus iniuriandi* where he or she uttered the insulting words as a joke if a 'reasonable bystander' would have 'regarded the words as a joke'.⁹² The defence of lack of *animus iniuriandi* serves to exclude intention and knowledge of unlawfulness.

Campanella argues that a negligence test should be adopted as a sufficient form of fault in rebutting mistaken belief of 'welcomeness' because

⁹⁰ See *Stockett v Tolin* 791 F Supp 1536 (SD Fla 1992) where the court inferred intention from the objective circumstances and held that the cumulative behaviour of Tolin's conduct constituted an intentional infliction of emotional distress.

⁹¹ *Neethling et al op cit* (n39) 164. See *Minister van veiligheid en sekuriteit en 'n ander v Kyriacou* 2000 (4) SA 337 (O) where the court held that on the facts of the case it was clear that the police officers throughout believed bona fide that the deportation report which contained defamatory remarks, was compulsory and that they were merely carrying out an instruction from higher authority. The court concluded that the respondent had accordingly not succeeded in proving that the police officers had *animus iniuriandi*.

⁹² *Neethling et al op cit* (n39) 166.

it is 'possible to harass another person negligently'.⁹³ The writer further opines that:

The practical consequences of adopting negligence as a standard of fault is that it becomes much more difficult for the accused person to raise the defence that he believed that his advances would be welcomed, because now he would have to show not only that such belief was genuine but also that it was reasonable – in the sense that the average employee in his position would have had the same belief.⁹⁴

It is argued that subjective intention (plus knowledge of unlawfulness) is sufficient to ground the *actio iniuriarum*. Since *animus iniuriandi* can be inferred from the objective circumstances, there is no need to expand the test to include negligence. *Animus iniuriandi* is thus presumed to exist when unlawfulness has been established on the part of the defendant. It is also dealt with by the concept of *dolus eventualis*, which looks at the offender's foresight of the possibility of the unlawfulness of his conduct when he inflicts sexual harassment. Foresight of even a remote possibility and nevertheless going ahead recklessly would appear to be sufficient to establish *dolus eventualis*.

5.2.4 Damages under the *actio iniuriarum*

Windeyer J expressed the difficulty in assessing and quantifying non-patrimonial damages under the *actio iniuriarum* in *Uren v John Fairfax & Sons Pty Ltd*⁹⁵ that damage to a personality right 'cannot be measured as harm to a tangible thing is measured'. Windeyer J stated that compensation by damages operates in two ways - that is to say, as a vindication of the plaintiff to the public and as consolation to him for a wrong done.⁹⁶ It is submitted that payment of damages is therefore not concerned only with pure economic loss, but in the context of sexual harassment includes intangible loss. Therefore, damages serve to console the plaintiff for the impairment to her dignity.

⁹³ J Campanella 'Sexual Misconduct - Is there strict liability for harassers' (1994) 15 ILJ 491 at 495.

⁹⁴ Campanella *op cit* (n93) 496-7.

⁹⁵ (1966) 117 CLR 118 (HC) at 151.

⁹⁶ *Ibid.*

In *Grobler*⁹⁷ the Supreme Court of Appeal confirmed that as a result of sexual harassment, Grobler suffered from 'post-traumatic stress disorder' and thus dismissed the appeal with costs thereby confirming the High Court award of R150 000 for general damages. It is submitted that under the Compensation for Occupational Injuries and Diseases Act⁹⁸ (hereinafter referred to as 'COIDA'), Grobler would not have been able to claim for pain and suffering and for stress related injury because the event that triggered post traumatic was not in the scope of employment.⁹⁹ The COIDA in any event compensates for physical injuries, medical costs, and pecuniary benefits, which are capped in terms of minimum and maximum amounts payable and not for emotional injuries often sustained in sexual harassment.¹⁰⁰

Calculation, computation and assessment of general damages in the absence of pecuniary loss as is the case with impairment of dignity, is an onerous exercise. Judge Wilcox J in *Hall & Ors v A & A Sheiban Pty Ltd & Ors*¹⁰¹ expressed the onerous task of putting price on dignity by stating that 'damages for such matters as injury to feelings, distress, humiliation and the effect on the claimant's relationships with other people are not susceptible of mathematical calculation'. The Federal Court of Australia held that:

Damage is not to be ignored or discounted simply because the effect of the conduct on the complainant is unusually severe' but instead 'the rule is the same as in other areas of tort law: a sexual harasser takes his victim as he finds her'.¹⁰²

Impairment of dignity is thus not capable of being quantified in monetary terms for the purpose of awarding damages. The task is made difficult by the non-economic factors, which should be taken into account in the assessment of damages. The award for damages is decided on a case-by-case basis and is

⁹⁷ *Supra* (n12) at para 60.

⁹⁸ 130 of 1993.

⁹⁹ *Supra* (n12) at para 70.

¹⁰⁰ S 16 and schedule 4 COIDA.

¹⁰¹ (1988) 20 FCR 217 at para 42.

¹⁰² *Supra* (n101) at para 43.

discretionary to the court, which will take all facts and circumstances into account in arriving at a fair and just assessment of general damages.

It is argued that the court will take into account the following factors in reaching a delictual assessment for *common-law* damages which are the same factors considered by the court when awarding damages in terms of section 50(2)(b) of the EEA:

- a) Abuse of power in a dependency and trust relationship;¹⁰³
- b) Failure by employer to act;¹⁰⁴
- c) Whether the plaintiff has suffered a tangible employment action or a hostile environment harassment;¹⁰⁵
- d) Side-effects of trauma caused by sexual harassment;¹⁰⁶
- e) Retaliation against employee once she has complained;
- f) Failure by the plaintiff to take advantage of the preventative and remedial mechanisms in place in the workplace.

The court must not make an award for damages which 'shocks one's conscience and cries out to be voided' but must be based on a 'reasoned assessment of the evidence'.¹⁰⁷ On policy grounds, the award for damages must carry an important message so as not to condone or trivialise impairment of dignity¹⁰⁸ but at the same time must not be excessive to be without any rational basis. Compensation for injured feelings thus guards against infringement on personality rights.

¹⁰³ *Grobler v Naspers Bpk & Another* [2004] 5 BLLR 455 (C).

¹⁰⁴ *Ntsabo supra* (n31).

¹⁰⁵ *Christian v Colliers Properties* [2005] 5 BLLR 479 (LC).

¹⁰⁶ *Ntsabo supra* (n31) and *Christian v Colliers supra* (n105).

¹⁰⁷ RF Gregory *Unwelcome and Unlawful: Sexual Harassment in the American Workplace* (2004) at 218.

¹⁰⁸ Similarly, in *McCarthy v Metropolitan (Perth) Passenger Transport Trust (Transperth)* (1993) EOC 92-478 it was noted that it is important that awards aimed at compensating for injured feelings should not be minimal because that would tend to trivialise or diminish respect for public policy.

5.3 Constitutional protection of dignity¹⁰⁹

So now, when a woman is sexually harassed and she speaks of it, that is not simply a woman speaking in a different voice or narrating her subject experience of her situation. She is saying what happened to her. And what happened to her, when it happens, is now authoritatively recognized in law as inequality on the basis of sex, that is, as a violation of women's human rights.¹¹⁰

The founding provision of the Constitution highlights human dignity as an important constitutional value in our democratic South Africa¹¹¹ and 'nothing is more destructive of human dignity than being forced to perform sexual acts against one's will'.¹¹² This section will demonstrate how sexual harassment is unacceptable in an open and democratic South Africa because it violates the constitutional right to dignity by treating women as sub-human, unequal and sub-citizens in total disregard of their emancipation, dignity, self-esteem, personal integrity, and *ubuntu*.

It will be outlined that sexual harassment generates gender discrimination and inequality in the workplace and conveys the message that women are 'primarily perceived, not as workplace colleagues and valuable assets, but merely as sexual objects'.¹¹³

5.3.1 The Constitutional Court protection of the right to human dignity

An impairment of human dignity is a fundamental harm suffered by a victim of sexual harassment as it undermines the value and worth of a woman as an autonomous human being as acknowledged by Ehrenreich¹¹⁴ that:

The most fundamental harm of sexual harassment is dignitary harm: by humiliating, intimidating, tormenting, pressuring, or mocking individuals in their places of work, sexual harassment is an insult to the dignity, autonomy and personhood of each victim...

¹⁰⁹ S 10 Constitution.

¹¹⁰ CA MacKinnon *Are Women Human?: And Other International Dialogues* (2006) at 47.

¹¹¹ S 1 Constitution.

¹¹² *Nichols v Frank* 42 F 3d 503 (9th Cir 1994) at 510.

¹¹³ RF Gregory *Unwelcome and Unlawful: Sexual Harassment in the American Workplace* (2004) at 10.

¹¹⁴ Ehrenreich *op cit* (n35) 16.

It is clear from the outline of judicial precedent, which follows, that the Constitutional Court has not hesitated to protect and uphold the right to human dignity:

- a) Human right to dignity is a building block upon which the Constitution is framed.¹¹⁵
- b) The Constitutional Court has held that 'the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society'.¹¹⁶
- c) The Constitutional Court has reiterated that the right to human dignity is an irrevocable right, which cannot be compromised or waived even when the person is a public figure with a diminished right to privacy.¹¹⁷
- d) In *S v Makwanyane and Another*,¹¹⁸ the Constitutional Court agreed that the imposition of capital punishment constituted cruel, inhuman, and degrading punishment. Justices Langa, Mahomed, Mokgoro and O'Regan were of the view that capital punishment would not only have amounted to encroachment on the prisoner's right to dignity, but would have amounted to a complete destruction and unjustifiable infringement of the prisoner's right to human dignity.
- e) The Constitutional Court has also established that where the removal of a person to another country is effected by the state in circumstances that threaten the life or human dignity of such person, sections 10 and 11 of the Bill of Rights are implicated.¹¹⁹

¹¹⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] 7 BCLR 687 (CC) at para 73.

¹¹⁶ *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] 12 BCLR 1517 (CC) at para 28.

¹¹⁷ *Khumalo and others v Holomisa* [2002] 8 BCLR 771 (CC).

¹¹⁸ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC).

¹¹⁹ *Mohamed v President of the Republic of South Africa* [2001] 7 BCLR 685 (CC).

- f) The Constitutional Court has outlawed the *common-law* of sodomy, upheld the right to dignity, and protected gay and lesbian groups.¹²⁰ In so doing, the court emphasized that the vulnerability of the aforementioned groups makes discrimination on grounds of sexual orientation more likely to be unfair.
- g) In *K v Minister of Safety and Security*, one of the factors that the Constitutional Court took into account in finding the employer vicariously liable was that the rape, which was found to be in the scope of employment, infringed K's rights to dignity and security of person.¹²¹

In *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others*,¹²² the court stated that dignity contemplates a much wider range of situations, irrespective of membership to a protected class, and offers protection to persons in their multiple identities and capacities. The Constitutional Court gave examples of indignity thereby giving hope for sexual harassment victims that it will not hesitate to rule that sexual harassment is unconstitutional because the attendant indignity is even greater in sexual harassment than in examples listed by the court:

This could be to individuals being disrespectfully treated, such as somebody being stopped at a roadblock. It also could be to members of groups subject to systemic disadvantage, such as farm workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in. These would be cases of indignity of treatment leading to inequality, rather than of inequality relating to closely held group characteristics producing indignity.¹²³

The right to dignity is therefore not only concerned with an individual's sense of self-worth, but constitutes an affirmation of the intrinsic worth of human beings in our democratic society.¹²⁴ Dignity is a fundamental right, which cannot be waived or compromised. Ehrenreich correctly

¹²⁰ *National Coalition* supra (n116).

¹²¹ *Supra* (n19) at para 57.

¹²² *Supra* (n116) at para 124.

¹²³ *Ibid.*

¹²⁴ *Holomisa* supra (n117) at para 27.

describes sexual harassment as conduct, which 'violates each individual's right to be treated with the respect and concern that is due to her as a full and equally valuable human being'.¹²⁵ It is submitted that the history of patriarchal domination, subservience, and vulnerability of women in South Africa is one of the factors that the court will take into account in protecting dignity. These factors weigh in women's favour of the court finding that gender discrimination flowing from sexual harassment is unfair and taking into account the aggravating fact that gender discrimination has led to the invasion of additional women's constitutional rights to dignity and equality.

In *President of the Republic of South Africa and Another v Hugo*,¹²⁶ O'Regan J held that there are two factors relevant to the determination of unfairness - that is to say, the vulnerability of the group and the impact of the discrimination on the interests of those concerned. The court further held that the more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair.¹²⁷ Similarly, the court held, the more invasive the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair.¹²⁸

It is highlighted that the vulnerability of women in a male-dominated workplace leads to a presumption that gender discrimination suffered is automatically unfair. At the same time, the invasive nature of the wrong of sexual harassment, leads to a presumption that gender discrimination suffered is automatically unfair. It is observed therefore that the subordination and vulnerability of women makes them more prone to abuse and exploitation, and the resultant harm is greater. There is a correlation between disparity in power relations and potential abuse of that power leading to impairment of dignity of women in a weaker position than her

¹²⁵ Ehrenreich *op cit* (n35) 16.

¹²⁶ 1997 (6) BCLR 708 (CC) at para 112.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

male supervisor counterpart because 'an invasion of dignity is more easily established when there is an inequality of power and status between the violator and the victim'.¹²⁹

Sexual harassment involves an unlawful encroachment on the women's right to dignity. Imprisonment involves a legal encroachment on the prisoner's rights and yet the Constitutional Court has protected the prisoner's right to dignity without hesitation. Similarly, a woman's right to be free from sexual harassment should be protected by the courts. This highlights the importance of dignity in a democratic South Africa and upholding a value, which is integral to the Constitution.

In the United States Constitution, 'dignity' is not explicitly mentioned and equality is the most fundamental liberty to the people of America. Hence many of the tort cases in the United States have to fit the sexual harassment claims into the existing pigeon-holes of action for slander, false imprisonment, intentional infliction of emotional harm, intrusion of physical solitude, battery and invasion of privacy. MacKinnon explains a possible reason of the absence of 'dignity' in the United States Constitution as follows:

In comparison, when asked what right is violated by harassment, people in the United States tend to refer to equality. To many individuals, it indicates an unequal status that women are sexually harassed at work, and it seems to violate a right to equal opportunities in making one's living. This correlates to the understanding of harm established by the U.S. civil rights movement where equality was used in litigation for the right against violence, harassment, and unequal access to public facilities. In the United States, equality seems to provide the standard for violation of rights.¹³⁰

It is highlighted that dignity and equality are interrelated in that dignity is a founding value upon which all other human rights flow. The United States group based approach looks at sexual harassment as a violation

¹²⁹ *National Coalition* supra (n116) at para 125.

¹³⁰ S Baer 'Dignity or Equality? Responses to Workplace Harassment in European, German, and U.S. Law' in *Directions in Sexual Harassment Law* CA MacKinnon and RB Siegel (2004) at 588.

of gender equality thereby protecting women as a class, and not as individual autonomous human beings. It is emphasized that:

Violated human dignity, sexual autonomy, and integrity capture what happens to women when they feel that someone has overstepped a boundary or intruded into their emotional or physical space.¹³¹

It is further argued that dignity is therefore primary in protecting individual autonomy before protecting women by virtue of their membership to a protected class. The United Nations Convention on the Elimination of All Forms of Discrimination against Women¹³² provides that gender discrimination is a violation of principles of equality and dignity of women. It reiterates the importance of the worth of women and an urgency to eliminate gender discrimination as an obstacle to gender equality in its pre-amble as follows:

Recalling that discrimination against women violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of women, on equal terms with men, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of women in the service of their countries and of humanity...

This makes South Africa one of the more liberated jurisdictions in the world. It upholds the right to human dignity in the *common-law actio iniuriarum* and the universal fundamental constitutional standard for violation of human rights. In South Africa, the impairment of dignity because of sexual harassment is a viable remedy because section 39(2) of the Constitution enjoins the courts when developing *common-law*, to promote the spirit, purport, and objects of the Bill of Rights, thereby protecting the rights of women in the workplace.

¹³¹ KS Zippel *The Politics of Sexual Harassment: A Comparative Study of the United States, the European Union, and Germany* (2006) at 220.

¹³² UN General Assembly 'Convention on the Elimination of All Forms of Discrimination against Women' (1979).

5.3.2 Section 36 of the Constitution – The limitation clause

The rights guaranteed in chapter three of the Constitution are not absolute but are subject to the limitation clause as contained in section 36 of the Constitution. The limitation of the rights in terms of section 36¹³³ must be justifiable and reasonable in an open and democratic society based on human dignity, equality, and freedom. The meaning of what is 'justifiable and reasonable' is the same as in *common-law* in that the objective standard is applied taking into account 'the prevailing norms of society';¹³⁴ the spirit, purport and objects of the Bill of Rights.¹³⁵

It is submitted that the objective test to dignity acknowledges that some infringements of dignity might be reasonable and justifiable. However, it is emphasized that it is inconceivable that an impairment of dignity in the context of sexual harassment can be justifiable and reasonable in an open and democratic South Africa mainly because dignity is featured in the Constitution as a right,¹³⁶ as a founding value as reflected in the pre-amble and an underlying value in the limitation clause.¹³⁷ If one looks at proportionality,¹³⁸ a lot is at stake when trying to limit the right to dignity in terms of section 36 of the Constitution especially taking into account other

¹³³ S 36 Constitution.

¹³⁴ *De Lange supra* (n37) at 862A-G.

¹³⁵ S 39(2) Constitution.

¹³⁶ S 10 Constitution. See also *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (2) BCLR 120 (SCA) at paras 30-1, Nugent J cited with approval *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997(1) BCLR 1 (CC) at para 20 and held that there were considerations which constitute reasonable and justifiable grounds for limiting the protection that section 10 of the Constitution accorded to dignity so as to exclude from its scope a right on the part of every applicant for asylum to undertake employment.

¹³⁷ S 36 Constitution.

¹³⁸ In *S v Makwanyane supra* (n118) at 104, Chaskalson P held that:

There is no absolute standard which can be laid down for determining reasonableness and necessity and that in the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of section 33(1) and the underlying values of the Constitution...

constitutional rights¹³⁹ violated by an act of sexual harassment. It is argued that *ubuntu*, dignity and gender equality are of significant importance in this period of democratic transition. The limitation of such rights can never be justifiable in an open and democratic society since the society would cease to be open and democratic if such rights were restricted.

It is suggested that women can never be equal when their *ubuntu* and dignity are violated. Therefore, the limitation clause in such circumstances would completely curtail the personhood, freedom, and liberty of women in an open and democratic society. Sexual harassment involves a complete negation of *ubuntu* of the individual and a complete disregard of dignity. It is submitted that since dignity is about respecting the human worth and freedom of individuals, limitation of dignity in terms of section 36 of the Constitution would hinder the plaintiff from free and equal participation in the labour market in the face of indignity and gender discrimination. The limitation of dignity would be inimical to the spirit of *ubuntu* and legislative intent of achieving gender equality and eliminating unfair discrimination, which is endorsed in the EEA and the Constitution.

It is inconceivable that the Constitutional Court can limit the right to dignity whilst maintaining its content - when it is also the founding value from which other rights are premised and a value to be taken into account when applying the limitation clause in section 36 of the Constitution, and still uphold the essence of the Constitution.

5.3.3 Distinction between delictual and constitutional remedies

A distinction must be drawn between delictual and constitutional remedies especially in the light of the fact that dignity is protected both under a delictual remedy of the *actio iniuriarum* and in terms of section 10 of the

¹³⁹ Ss 9, 10, 12 and 22 Constitution.

Constitution. A plaintiff must be cognizant of the fact that it may not be feasible for the courts to develop a constitutional delict in the context of sexual harassment in the workplace because 'to recognize all constitutional violations as infringements of dignity' would 'confuse the wider concept of dignity under the Constitution with a narrow concept of *dignitas*'.¹⁴⁰

The plaintiff must thus be aware of the ends to be achieved by the appropriate remedy:

In delict, an award of damages is the primary remedy, its aim being to afford compensation in respect of the legal right or interest that has been infringed. The purpose of a constitutional remedy is to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages is a secondary remedy to be made in appropriate cases.¹⁴¹

In the light of the above extract, the plaintiff can therefore not (at least at the present time) allege a constitutional breach of right to dignity and equality and to that end seek delictual damages for the alleged violation. The plaintiff can pursue the *actio iniuriarum* for damages and only seek constitutional relief where the desired end is to vindicate the rights violated and to interdict any future infringement.

Constitutional damages may be awarded 'in exceptional circumstances when other remedies would not be effective and if there is no other compensatory remedy available in law'.¹⁴² In *President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd*¹⁴³ the court awarded constitutional damages and held that 'the only appropriate relief that, in the particular circumstances of the case, would appear to be justified is that of "constitutional" damages'. Therefore, it is observed that constitutional damages may be awarded to protect the constitutionally entrenched rights where it is necessary to uphold precepts of justice and an alternative appropriate relief is not feasible on the facts of the case.

¹⁴⁰ *Dendy* supra (n58) at para 23.

¹⁴¹ *Dendy* supra (n58) at para 20.

¹⁴² *Ibid.*

¹⁴³ [2004] 3 All SA 169 (SCA) at para 43.

In the context of sexual harassment in the workplace, constitutional damages may not be feasible where *common-law* or other alternative relief 'would be a sufficiently appropriate remedy to vindicate a plaintiff's right'¹⁴⁴ and would 'be a powerful vindication of the constitutional rights in question requiring no further vindication by way of an additional award of constitutional damages'.¹⁴⁵ Currently in South Africa, there are, in any event, adequate alternative remedies available to the victim of sexual harassment thereby militating against a likelihood of an exceptional award for constitutional damages.

5.4 Common-law Tort Remedy in the United States

This section deals with how and to what extent the United States courts have been willing to give redress to victims of sexual harassment under a tort-based approach. It is observed that there is no explicit legal protection of dignity in the United States and as a result, personality rights violated have been protected using the existing tort remedies like slander, invasion of privacy, emotional distress, false imprisonment, intrusion of physical solitude and battery. The standards for proving these *common-law* torts 'are generally quite stringent, including that the offending conduct must be not merely offensive but outrageous, "exceeding all bounds usually tolerated by decent society"'.¹⁴⁶ The advantage in South Africa is that there is a specific provision for protection of impairment of dignity both at *common-law* and in the Constitution.

¹⁴⁴ *Fose v Minister of Safety and Security* 1997 (7) BCLR 851 at para 68.

¹⁴⁵ *Fose supra* (n144) at para 67.

¹⁴⁶ AB Cochran *Sexual Harassment and the Law: The Mechelle Vinson Case* (2004) at 162.

5.4.1 United States judicial precedent on tort remedies

In *Stockett v Tolin*¹⁴⁷ the plaintiff alleged that her supervisor, Tolin subjected her to repeated sexually harassing behaviour, which included, grabbing her breasts and nipples, running his fingers up her shirt and grabbing her from behind. The court allowed a tort claim to succeed in favour of the plaintiff and held that Tolin's groping and kissing of Stockett constituted both an offensive and unwelcome touching (battery) and an invasion of her physical solitude (invasion of privacy).¹⁴⁸ In addition, the act of pinning plaintiff against the wall and refusing to allow her to escape, even though only done for a short period, was held to constitute false imprisonment.¹⁴⁹ The court characterized Tolin's conduct toward Stockett as being outrageous, wanton, wilful, and in total disregard of her rights.¹⁵⁰

The cumulative behaviour of Tolin's conduct was held to constitute an intentional infliction of emotional distress. The court thus viewed sexual harassment as a violation of personality rights, an intrusion into the plaintiff's physical solitude, an invasion of privacy and false imprisonment. It is emphasized that the court inferred intention from wrongfulness of Tolin's conduct in that his conduct was held to amount to an intentional infliction of emotional distress.

In *Godfrey v Perkin-Elmer Corp*¹⁵¹ the New Hampshire court held that allegations of sexually harassing behaviour that included frequent suggestive comments, demeaning language, insulting remarks made in front of co-workers, staring, and 'sitting and standing inordinately close, often in a sexually suggestive manner' could, if proved, be viewed as constituting both intentional infliction of emotional distress and slander. The court noted that conduct must be outrageous in character, and so extreme in degree, as to go

¹⁴⁷ 791 F Supp 1536 (SD Fla 1992).

¹⁴⁸ *Supra* (n147) at 1555-6.

¹⁴⁹ *Supra* (n147) at 1556.

¹⁵⁰ *Ibid.*

¹⁵¹ 794 F Supp 1179 (DNH 1992).

beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.¹⁵² On the facts, the court held that the conduct complained of went 'beyond the mere indignities, annoyances, or petty oppressions that one may expect to encounter in one's daily life and that cannot be redressed by this tort'.¹⁵³

The court went on to note that the standard to be used to assess whether statements uttered were defamatory is based on the 'average person'.¹⁵⁴ The court was satisfied that a remark such as 'your job isn't important and doesn't require brains' was easily susceptible of being verified as true or false and that an average person could thus understand the remark to be factual and could reasonably hear those words to defame the plaintiff.¹⁵⁵ The court further analysed the statements 'you have a bad attitude' and 'you have a lot of growing up to do' taking into account the circumstances of the case that the plaintiff had suffered through more than a year of sexually suggestive and demeaning comments and conduct. In the light of the prevailing circumstances the court held that the defendant's utterances to the supervisee could be construed as actionable opinion and could be understood to imply the existence of defamatory fact (for example, immaturity, perhaps, for not responding affirmatively to sexual advances).¹⁵⁶

It is submitted that the courts in the United States advocate the use of an objective test to *common-law* torts (which is consistent with the South African test on impairment of dignity in *De Lange v Costa*¹⁵⁷) of whether 'an ordinary prudent person, viewing his cumulative behaviour, would be compelled to find this to be outrageous'.¹⁵⁸ What is worth noting is that sexual harassment is an indignity, annoyance, or material oppression that an average

¹⁵² *Supra* (n151) at 1189.

¹⁵³ *Ibid.*

¹⁵⁴ *Supra* (n151) at 1191.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Supra* (n151) at 1192.

¹⁵⁷ 1989 (2) SA 857 (A).

¹⁵⁸ *Stockett supra* (n147).

person may not be expected to encounter and endure in one's daily working life.¹⁵⁹

In *Priest v Rotary*¹⁶⁰ a waitress was assigned to a coffee shop rather than a high-tip cocktail lounge and was eventually terminated because of her negative reaction to employer's request for sexual favours and employer's other conduct of sexual nature. The court held that the conduct inflicted on the complainant caused:

highly unpleasant mental reactions, including fright, humiliation, shock, surprise, sickness, nervousness, apprehension, disgust, emotional pain, intimidation, embarrassment, anger, worry, substantial sleeplessness, nausea and anxiety.¹⁶¹

The court held that the defendant's conduct consisted of more than mere insults, indignities, threats, annoyances, petty oppression, or other trivialities in that the conduct of defendant was of an extreme and outrageous nature.¹⁶² The court was thus of the view that such conduct went beyond the acceptable bounds of decency, and no reasonable person could be expected to endure it.¹⁶³ The court also found the defendant liable for subjecting the plaintiff to unlawful and repeated offensive touching constituting battery and false imprisonment without her consent and without a lawful privilege.¹⁶⁴

The court thus recognized sexual harassment as an indecent and unethical behaviour, which cannot be viewed as a normal way of relating in the workplace. The valuable principle developed in this case is that sexual harassment is an unlawful and offensive behaviour, which has detrimental effects on the mental tranquillity and welfare of the plaintiff and the courts will not hesitate to uphold its zero tolerance in the workplace.

In *Kanzler v Renner*¹⁶⁵ the court also used a tort remedy to give a victim of sexual harassment redress and held that inappropriate sexual conduct in

¹⁵⁹ *Godfrey supra* (n151).

¹⁶⁰ 634 F Supp 571 (ND Cal 1986).

¹⁶¹ *Supra* (n160) at 578.

¹⁶² *Supra* (n160) at 583.

¹⁶³ *Ibid.*

¹⁶⁴ *Supra* (n160) at 583-4.

¹⁶⁵ 937 P 2d 1337 (Wyo 1997).

workplace can, upon sufficient evidence, give rise to claim for intentional infliction of emotional distress. The court held that our society has ceased seeing sexual harassment in the workplace as a playful inevitability that should be taken in good spirits because it has a corrosive effect on those who engage in it, as well as those who are subjected to it.¹⁶⁶ The court went on to note that such harassment has far more to do with the abusive exercise of one person's power over another than it does with sex.¹⁶⁷

The court noted the importance of the context of workplace within which sexual harassment occurs and found 'recurring factors that courts have used to assist in the determination of whether particular conduct in the workplace is sufficiently outrageous to survive a preliminary motion' which included the following:

- a) Abuse of power by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests;
- b) Repeated pattern of harassment;
- c) Unwelcome touching/offensive, non-negligible physical contact (off limits to any person other than a consensual intimate partner); and
- d) Retaliation for refusing or reporting sexually-motivated advances.¹⁶⁸

The court correctly highlighted the fact that sexual harassment has more to do with an expression and abuse of supervisory power than it does with sexual conduct. It is submitted that the reasoning in *Kanzler*¹⁶⁹ (abuse of power) can be compared to *K v Minister of Safety and Security*¹⁷⁰ where the rape of the victim was facilitated by the fact that she might have initially seen policemen as protectors and caretakers. Their role and power as policemen created an opportunity for them to take advantage of the victim and to abuse their position. The subsequent rape of the victim was thus more of an abusive exercise of the policemen's power over her than it had to do with self-gratification of having sexual intercourse.

¹⁶⁶ *Supra* (n165) at 1342.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Supra* (n165) at 1343.

¹⁶⁹ *Ibid.*

¹⁷⁰ [2005] 8 BLLR 749 (CC).

Ehrenreich has correctly noted that the notion of 'abuse of power' in *Kanzler*¹⁷¹ suggests 'that dignitary harms inflicted in the workplace could be seen as inherently aggravated by the very fact that they occur in the workplace'.¹⁷² This is so because sexual harassment occurs 'in the workplace, a setting in which employees are clearly in a dependent relationship both vis-à-vis their supervisors (most obviously) and vis-à-vis their co-workers (less obviously, but equally powerfully)'.¹⁷³ It is emphasized that sexual harassment by a supervisor will always constitute abuse of power and trust as discussed in chapter seven.

5.5 Breach of contract of employment

This section outlines that where the relationship between the parties is that of employer and employee, the duty of care arises from an implied term of the contract of employment despite the absence of any legal obligation on the employer to prevent sexual harassment in the workplace. This creates scope for finding the employer personally liable for breach of contract of employment.

In *Spring v Guardian Assurance plc*¹⁷⁴ Lord Woolf considered whether the primary basis of liability resulting from the breach of duty of care is contractual rather than tortious, and held as follows:

Furthermore, in the employment field, there has always been a considerable overlap between claims based on an alleged breach of duty in contract and in tort, as stated in *Charlesworth & Percy on Negligence*, 8th ed. (1990), p. 795, para 10-06: "The relationship itself of master and servant is necessarily based upon contract but it has been the subject of some controversy in the past whether the *common-law* duties, regarding the servant's safety, are contractual duties or lie in tort. Because of the closeness of the relationship between the master and servant, as well as its very nature, there really

¹⁷¹ *Supra* (n165).

¹⁷² R Ehrenreich 'Dignity and Discrimination: Towards a Pluralistic Understanding of Workplace Harassment' (1999) 88 *Geo LJ* 1 at 45.

¹⁷³ *Ibid.*

¹⁷⁴ [1994] 3 All ER 129 at 147.

can be no doubt that a duty of care does arise under the law of tort, as expressed in *Donoghue v Stevenson* ([1932] AC 562, [1932] All ER Rep 1)..."¹⁷⁵

The employer is thus under *common-law* duty arising out of the contractual relationship of employment, by virtue of the proximity of such a relationship, to safeguard the workplace against sexual harassment since it is detrimental to both the servant's safety and welfare in the workplace. There is also an implied term in the contract of employment that the employer 'shall render reasonable support to an employee to ensure that the employee can carry out the duties of his job without harassment and disruption by fellow workers'.¹⁷⁶ The burden of proving that such support was given rests on the employer. It is a fundamental breach of the contract of employment if the employer fails to support the employee and to correct sexual harassment, which was intolerable to the employee and led to constructive dismissal.¹⁷⁷

It is submitted that the employer is under an obligation to ensure a safe, sound, and tranquil work environment, which encourages proper execution of duties without disruption, gender discrimination, or harassment. This duty of care is owed to 'newly appointed and long established employees' as they are 'equally vulnerable in situations of sexual harassment, and therefore equally deserving of protection'.¹⁷⁸ It is worth highlighting that the duty of care is 'both contractual and delictual in character and that the plaintiff is at liberty to sue either for breach of contract or for negligence'.¹⁷⁹ In *Davie v New Merton Board Mills*, Lord Simonds held:

The same act or omission by an employer may support an action in tort or for breach of an implied term of the contract of employment but it can only lead to confusion, if, when the action is in tort, the court embarks on the controversial subject of implied contractual terms.¹⁸⁰

¹⁷⁵ *Supra* (n174) at 167.

¹⁷⁶ *Wigan Borough Council v Davies* [1979] ICR 411 (EAT) at 414.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Christian v Colliers supra* (n105) at 483.

¹⁷⁹ *Glass et al op cit* (n8) at 1.

¹⁸⁰ [1959] 1 All ER 346 at 350. See also *Matthews v Kuwait Bechtel Corporation* [1959] 2 All ER 345, where an employee suffered personal injuries in the course of employment and the court held that an action for damages was maintainable at the option of the employee either in tort, or in contract, there being an implied term of the contract imposing a duty of care on the employer.

personality rights in delict.¹⁸⁴ Mowatt argues that where an employer imposes gender discrimination to the 'detriment of the ability of the employee to perform her work properly' or 'to the extent that the employee's other abilities for the work are ignored, a breach of contract has occurred'.¹⁸⁵ Mowatt thus opines that in such an instance 'sexual harassment may constitute a sufficiently serious breach to allow the aggrieved employee to invoke the right to terminate the contract and claim relief'.¹⁸⁶

If sexual harassment interferes with the worker's ability to properly execute her duties or hinders her prospects for career advancement thereby amounting to career sabotage, then the plaintiff can pursue a remedy for breach of contract. However, the right to opt out and terminate the contract of employment should not be encouraged, as that will serve to preserve the workplace as an exclusive man's world. Instead, it is suggested that women must be encouraged to press on and fight for their rights until all barriers to gender equality, which threaten their livelihood and economic prosperity, are broken.

5.6 Conclusion

A central focus of the chapter was personal liability of the employer in delict and contract; and the protection of dignity in terms of the Constitution and under the *common-law actio iniuriarum*. Mowatt correctly asserts that the advantage of a delictual remedy of the *actio iniuriarum* is compensation for sentimental damages.¹⁸⁷ The writer endorses the impairment of dignity as being 'flexible enough to include the obvious forms of sexual harassment'.¹⁸⁸

¹⁸⁴ *Edouard supra* (n183) at 590A.

¹⁸⁵ JG Mowatt 'Sexual Harassment - Old Remedies for a New Wrong' (1987) 104 *SALJ* 439 at 449.

¹⁸⁶ *Ibid.*

¹⁸⁷ Mowatt *op cit* (n185) 450.

¹⁸⁸ *Ibid.*

The advantage of the *actio iniuriarum* is that compensation for emotional injuries which is often incurred in sexual harassment cases can be recovered, unlike in the context of a contractual remedy or the COIDA where the plaintiff cannot be compensated for sentimental loss or emotional pain and suffering. Furthermore, in South Africa the violation of dignity is compensable under section 50(2)(b) of the EEA as part of unfair discrimination suffered and claiming payment of damages which entails intangible loss often suffered as a result of sexual harassment. Damages which can be claimed in the *actio iniuriarum* and section 50(2)(b) of the EEA, are not capped but are discretionary to the court.

Burchell correctly supports the delictual remedy of the *actio iniuriarum* as an effective way of protecting the individual's right to dignity in the light of the fact that rights and freedoms entrenched in the Bill of Rights 'coincide with certain of the rights protected by the law of delict'.¹⁸⁹ A delictual claim under the *actio iniuriarum* for an impairment of dignity would serve a viable alternative remedy for victims of sexual harassment in that this personality right to dignity has been elevated to a status of being a guaranteed freedom in the Constitution which is the highest law of the land. This means that the courts will be more inclined to protect a woman's dignity in the workplace.

It has been noted that there are potential limitations to the delictual action under the *actio iniuriarum* because of the objective and subjective test for an impairment of dignity. This means that the requirements are stricter if one pursues a delictual action for sexual harassment rather than the labour law route under the EEA where sexual harassment is subjectively assessed. The objective test to an impairment of dignity introduced in *De Lange*¹⁹⁰ is a fundamental test used in the *actio iniuriarum* and means that the conduct complained of is objectively evaluated from the viewpoint of a reasonable

¹⁸⁹ J Burchell 'Beyond the Glass Bead game: Human Dignity in the Law of Delict' (1988) 1 SAJHR 6.

¹⁹⁰ *De Lange* supra (n37).

person, which determines whether the wrongful conduct is of such magnitude as to reasonably offend a person of ordinary sensibilities. The objective criterion is instructive in that it helps curb a potential flood of trivial claims.

The *actio iniuriarum* remedy for an impairment of dignity 'has been severely underutilized in the past'.¹⁹¹ The advantage of the remedy for an impairment of dignity in sexual harassment cases is that 'it focuses directly on the breach of natural justice and is not dependent upon proof that patrimonial loss has been caused'.¹⁹² Ehrenreich rightly opines that 'common-law is inherently conservative, but it does change over time; it has changed before, and it will change again'.¹⁹³ Sexual harassment is an obstacle that prevents women from achieving their maximum potential and 'prevents women from making a contribution commensurate with their abilities'.¹⁹⁴

It is clear from the wealth of the constitutional law jurisprudence on the protection to human dignity, and more recently *NK (CC)*,¹⁹⁵ that the courts will not hesitate to uphold and protect the right to dignity of women where such right is threatened or encroached upon by an act of sexual harassment.¹⁹⁶ In this period of democratic transition, the courts will continue to do everything in their power to entrench the spirit of *ubuntu* in an effort to eradicate the injustices of the past and promote equality of women as rightful members of the civil society. This is strengthened by *Carmichele v Minister of Safety and Security*¹⁹⁷ where the Constitutional Court held that:

South Africa also has a duty under international law to prohibit all gender based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights.

¹⁹¹ Burchell *op cit* (n41) 336.

¹⁹² Burchell *op cit* (n41) 345.

¹⁹³ Ehrenreich *op cit* (n35) 56.

¹⁹⁴ 'Report of the Fourth World Conference on Women' Beijing (4-15 September 1995).

¹⁹⁵ *Supra* (n15).

¹⁹⁶ Ss 8(3), 39(2) and 173 Constitution.

¹⁹⁷ 2001 (4) SA 938 (CC) at para 62.

The United Nations has applauded the *Carmichele* judgement for setting an important precedent 'on the applicability of international law to State and individual responsibility for violence against women'¹⁹⁸ and noted that 'the use of international legal standards on violence against women by domestic courts is a promising practice'.¹⁹⁹

It is concluded that it is inconceivable that the Constitutional Court will successfully apply the limitation clause as contained in section 36 of the Constitution in the context of sexual harassment, in a democratic society, which is committed to achieving gender equality in the workplace. It has been noted that the plaintiff is therefore at liberty to seek the *common-law* remedy of the *actio iniuriarum* against the employer for an impairment of dignity and claim for damages, which are discretionary to the High Court. The plaintiff must be cognizant of the fact that whilst the Constitution and the *actio iniuriarum* both protect the right to dignity, the purpose of these remedies is different. The plaintiff can pursue the *actio iniuriarum* for damages since it sufficiently gives relief to the victim of sexual harassment for an impairment of dignity, and only seek constitutional relief where primarily, the desired end is to vindicate the rights violated and to interdict any future infringement.²⁰⁰

It has been noted that the federal courts have not hesitated to use the tort remedy to protect the dignity of women in an effort to restore gender equality in the workplace, even though dignity is not specifically listed in the United States Constitution but is conceptualized and protected as an affront to equality or privacy. It is for this reason that many of the tort cases in the United States fit the sexual harassment claims into the existing pigeon-holes of action for slander, false imprisonment, intentional infliction of emotional harm, intrusion of physical solitude, battery and invasion of privacy. It has

¹⁹⁸ United Nations General Assembly 'In-depth Study on All Forms of Violence against Women: Report of the Secretary-General' (6 July 2006) at 71-2.

¹⁹⁹ United Nations Report of the Secretary-General *op cit* (n197) 89.

²⁰⁰ See *Dendy* supra (n58).

been highlighted that the protection of dignity is advanced and broader in South Africa compared to the United States, since dignity is a constitutional right,²⁰¹ a founding value of the Constitution, a value to be taken into account when applying the limitation clause in section 36 of the Constitution, and is protected at *common-law* through the *actio iniuriarum*. Ehrenreich supports the use of 'common-law tort' approach and opines that:

Common-law torts applied creatively, might offer such a way to address most kinds of workplace harassment, and, because of the changed social meaning of work, the employment context should be considered an aggravating factor when courts assess workplace harms.²⁰²

It has been established in this chapter that the intentional infliction of emotional distress as a result of sexual harassment is even greater given the context of the workplace in that it occurs in a setting where 'it has the potential to prevent the achievement of one's professional fulfilment or self-definition'.²⁰³ It also occurs in a setting 'where women have been marginalized or relegated to distinct and limited roles and where they continue to face hostility and systematic obstacles to professional progress'.²⁰⁴ It is emphasized that the employment context is an aggravating factor to the wrong suffered in that it is an environment where individuals spend their lifetime contributing to economic prosperity and making their livelihood.

²⁰¹ S 9 Constitution.

²⁰² Ehrenreich *op cit* (n35) 53.

²⁰³ K Abrams 'The New Jurisprudence of Sexual Harassment' (1998) 83 *Cornell L Rev* 1169 at 1185.

²⁰⁴ *Ibid.*

Chapter Six – Labour Law Remedies

6.1 Outline

The scope of protection for the victims of sexual harassment under the EEA and LRA applies to all employees in the place of employment.¹ It would seem that a more generous, inclusive and less formal concept of who deserves legislative protection ('employee'),² is appropriate in the context of labour law remedies for sexual harassment, in the light of the following:

- a) The changing nature of employment with the advent of 'casualization, externalization and informalization';³
- b) The constitutional right to fair labour practices, which is available to 'everyone'.⁴
- c) South Africa's international obligations in terms of the ILO conventions and recommendations; and
- d) The mandate of the courts in terms of section 39(2) of the Constitution to develop *common-law* and interpret legislation to accord full protection of the constitutionally entrenched rights.⁵

However, precarious, informal, or other marginal workers might be excluded from the scope of legislative protection in terms of the LRA and EEA by virtue of the following provisions in section 200A(1) of the LRA, which requires that to be an employee:

¹ The 'employee' is broadly defined in section 1 of the EEA, LRA, Basic Conditions of Employment Act 75 of 1997 and Skills Development Act 97 of 1998 to mean:

'any person, excluding an independent contractor who-

- a) works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- b) in any manner assists in carrying on or conducting the business of an employer...'

² See also para 7.2.1 on the discussion of 'Who is an employee?'

³ J Theron 'Employment Is Not What It Used To Be' (2003) 24 ILJ 1247 at 1256-7.

⁴ S 23(1) Constitution.

⁵ See O'Regan J dicta in *South African National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at para 25.

- d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- e) ...
- f) the person is provided with tools of trade or work equipment by the other person; or
- g) the person only works for or renders services to one person.

This chapter will discuss the remedy of *statutory* vicarious liability in terms of section 60 of the EEA, which is a focal point of this research, and is distinct from *common-law* vicarious liability. The labour law remedy of *statutory* vicarious liability in terms of section 60 of the EEA is a unique form of legal liability, which is neither a true reflection of *common-law* liability nor an equivalent to *common-law* vicarious liability discussed separately in chapter seven. It will be outlined that section 60 of the EEA creates a unique type of *statutory* vicarious liability and contains an element of deemed personal liability on the part of the employer for failure to take steps and ensure eradication of gender discrimination in the workplace.

Statutory vicarious liability in section 60(3) balances opposing considerations 'that the employer is not responsible for policing all the nonwork behaviour of its employees, but that the employer owns and controls the workplace'.⁶ This chapter will highlight that in terms of section 60 of the EEA; fault on the part of the employer is not derivative but is independent of the fault-finding on the part of the perpetrator of sexual harassment. The affirmative defence in section 60(4) of the EEA which is available to the employer to exonerate itself from *statutory* vicarious liability will be discussed to highlight that vicarious liability is not an open-ended form of a liability even though it is a no fault liability.

The scope of the award of damages and compensation under section 50 of the EEA is explored to the extent to which the plaintiff can recover compensation in delict and under the LRA. A case is made for regarding sexual harassment as a form of misconduct warranting dismissal of the perpetrator. Constructive dismissal is also discussed, since sexual harassment

⁶ AB Cochran *Sexual Harassment and the Law: The Mechelle Vinson Case* (2004) at 140.

can be unbearable and lead to constructive dismissal if the employer fails to act after the plaintiff has complained about sexual harassment.

This chapter will highlight that the labour law remedies enhance protection and respect for labour rights and calls for the observing of human rights, which are entrenched in the Constitution. Labour law at times overlaps with delict on the duty of care owed by the employer to its employees who cannot assume a duty to fend for themselves from all the risks on safety, health, and discrimination, which are inherent in the workplace. Such duty rests with the employer and flows from the employer-employee relationship.

6.2 Statutory vicarious liability in terms of the Employment Equity Act 55 of 1998 ('EEA')

As a starting point, it is highlighted that the advantage with *statutory* vicarious liability is that it is not subject to the restrictive rules of scope of employment and is distinct from the delictual rules of vicarious liability. This form of *statutory* vicarious liability is different from and mutually exclusive to *common-law* vicarious liability discussed in chapter seven. It is emphasized that the employer cannot be cavalier but must act and comply with its statutory obligations in the EEA and ensure that gender discrimination is prevented and eliminated in the workplace. It is a statutory breach, which gives rise to vicarious liability on the part of the employer for its failure to take the necessary steps.

6.2.1 Section 60 of the Employment Equity Act

Sexual harassment is a statutory breach of section 6(1) of the EEA, which outlaws unfair discrimination on grounds of gender, sex, and/or sexual orientation. Section 6(1) of the EEA is a manifestation of the right not to be

unfairly discriminated directly or indirectly because of gender, sex and/or sexual orientation which is entrenched in section 9(4) of the Constitution. Relief for sexual harassment is available in terms of section 60 of the EEA, which deals with *statutory* vicarious liability of the employer. The relevant subsections of section 60 read as follows: -

- (1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.
- (2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.
- (3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.
- (4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.

Section 60 of the EEA evinces a legislative scheme and underlying policy, which includes deterring and outlawing sexual harassment in the workplace on grounds of gender discrimination. This is done through extending responsibility beyond the guilty employees, by making employers liable for sexual harassment, and then supplying them with the affirmative defence under section 60(4), which will:

exonerate the conscientious employer who has used his best endeavours to prevent sexual harassment, and to encourage all employers who have not yet undertaken such endeavours to take the steps necessary to make the same defence available in their own workplace.⁷

It is emphasized that section 60(1) of the EEA is aimed at encouraging employees to be pro-active and report instances of sexual harassment 'immediately' - that is to say, 'as, soon as is reasonably possible in the circumstances and without undue delay, taking into account the nature of

⁷ *Jones v Tower Boot Co Ltd* [1997] 2 All ER 406 at 415C-D.

sexual harassment'.⁸ It is noted that the insistence that a woman should be expected to complain in order to trigger the process for *statutory* vicarious liability in terms the EEA, may be viewed as insufficiently dealing with the vulnerability of the victim and the ability of sexual harassment itself to silence or intimidate victims from coming forward. The 2005 Code addresses such potential difficulties where the perpetrator is a person of seniority, by stating that:

Where a complainant has difficulty indicating to the perpetrator that the conduct is unwelcome, such complainant may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, family member or friend.⁹

It is argued that the plaintiff is expected to mitigate her loss by making use of the grievance procedure in place at work or request a colleague to lodge a complaint on her behalf. The effect of this measure will similarly help strengthen the plaintiff's case for constructive dismissal where she will be able to prove that she made use of the reasonable alternatives to no avail from the employer.

Both the employers and employees will not only win in the courtroom or in parliament, but in the workplace through collaborative effort the fight against sexual harassment in the workplace. Therefore, 'pushing women to report instances of sexual harassment should also be encouraged from a feminist standpoint'¹⁰ because 'it is important for women to be pro-active against this problem and by speaking out against such behaviour, women send a message that such conduct is not and should not be accepted'.¹¹ The employee must thus meet the employer half-way to fulfil the promise of the EEA to ensure gender equality in the workplace, by breaking the silence and

⁸ Item 8.1.2 2005 Code.

⁹ Item 5.2.3 2005 Code.

¹⁰ J Kreisberg 'Comment: Employers and Employees Beware: The Duties Imposed by the Recent Supreme Court Decisions and Their Impact on Sexual Harassment Law' (1999) 6 *Cardozo Women's L J* 153 at 179.

¹¹ *Ibid.*

reporting sexual harassment so as to enable the employer to act and correct gender discrimination.

Section 60(3) is a form of *statutory* vicarious liability as was confirmed in *Ntsabo v Real Security CC*¹² that where the employer allows and condones, either directly or by inaction, conduct which is or leads to a violation of the EEA, then the employer is vicariously liable for any damages flowing from such conduct. This form of *statutory* vicarious liability differs from *common-law* vicarious liability in that the 'scope of employment' is not part of the enquiry. In *Ntsabo*¹³ the court held that sexual harassment did not arise in the scope of employment because 'the conduct of which the applicant complained did not fall anywhere within the job description of Mr Dlomo or that of the applicant'. Le Roux is correctly critical of this reasoning (scope of employment) in *Ntsabo*¹⁴ and is of the opinion that it refutes:

the complex nature of modern employment and would in any event negate most claims based on either COIDA or vicarious liability since many of these claims are premised on incidents that would not fall within any job description or duties of the employee.¹⁵

It is suggested that in the light of the court's reasoning, if *Ntsabo* had brought a *common-law* claim for vicarious liability, then her action would have failed because the 'scope of employment' requirement would not have been established since the court would have been of the view it was not part of Dlomo's job description to sexual harass his subordinates. *Ntsabo*¹⁶ (the scope of employment reasoning) is consistent with English law in *Trotman v North Yorkshire County Council*¹⁷ where the court held that the sexual assault committed by a deputy headmaster on one of the pupils in his care, 'was far removed from an unauthorised mode of carrying out a teacher's duties on behalf of his employer'. The court was thus of the view that unless the

¹² [2004] 1 BLLR 58 (LC) at 98.

¹³ *Supra* (n12) at 97.

¹⁴ *Ibid.*

¹⁵ R le Roux 'Sexual Harassment in the Workplace: A Matter of More Questions than Answers or Do We Simply Know Less the More We Find Out?' 2006 (10) *Law, Democracy and Development* 49 at 61.

¹⁶ *Supra* (n12).

¹⁷ [1999] LGR 584 (CA) at 591.

business of the principal is to molest children, there will be denial of vicarious liability. This highlights the way courts have rigidly applied the 'scope of employment' to dismiss sexual harassment cases for what is perceived as personal, frolic of one's own or not within the harasser's job description to sexually harass, under the *common-law* principle of vicarious liability.

The legislature did not intend to import the principles of delict into the EEA and as such it must be read in the context in which it is framed - that is to say, to eliminate gender discrimination in the workplace and not make it unlawful and at the same time demanding for the plaintiff to prove gender discrimination. It is emphasized that to apply the *common-law* principles of 'course of employment' would serve to seriously undermine the statutory intention of section 60 of the EEA and would contravene the purpose which the EEA was passed to realize. Another distinguishing feature between a delictual remedy and section 60 of the EEA is that 'one of the elements of delict is *dolus* in the form of intention or negligence, but it is generally accepted that intent is not a relevant factor in determining liability for unfair discrimination'.¹⁸ Fault is not one of the elements of a section 60 enquiry but is deemed in terms of section 60(3) of the EEA.

One asks whether it is open for the employer to argue in defence in terms of section 60(4) that it is not responsible for the wrongful conduct of its servant in that sexual harassment was not authorised by the employer or that sexual harassment was not an unauthorised mode of doing some act authorised by the employer. The answer to this question is that this defence is not available to the employer in the context of section 60 of the EEA and this feature distinguishes *statutory* vicarious liability from *common-law* vicarious liability discussed in chapter seven. Under *common-law* vicarious liability employers often raised a defence that sexual harassment was neither part of the job description nor an unauthorized mode of performing an authorized

¹⁸ R le Roux 'Section 60 of the Employment Equity Act 1998: Will a Comparative Approach Shake this Joker of the Pack?' (2006) 27 *Obiter* 3 at 5 (forthcoming).

act. This led the courts to dismiss sexual harassment cases for what was perceived as a frolic of one's own; personal; or not part of the job description of the perpetrator to sexually harass employees.

The use of the term 'deemed' in section 60(3) can be interpreted to mean 'fault' is inferred to the employer. This creates a special form of *statutory* vicarious liability in section 60 in that the difference between *common-law* vicarious liability and the 'deemed' form of employer liability is that the latter appears to contain both elements of personal (deemed fault) and vicarious liability on the part of the employer. It is emphasized that failure to act on the part of the employer in terms of section 60(3) of the EEA means that the employer is rubber-stamping sexual harassment and is undermining both the letter and spirit of the EEA in that:

If targets complain or if these misdeeds pollute the workplace to the extent that the employer should have been aware of the problem and corrected it, the employer can properly be held financially liable to the victims of such an abusive work environment when the employer negligently fails to clean it up.¹⁹

It has been correctly suggested by Le Roux that section 60(3) of the EEA creates 'a form of direct liability for failing to address equity in the workplace'.²⁰ It is observed that focus in terms of section 60 is thus not only on the employee's wrongful conduct, but also on the employer's personal negligence which focuses on the extent to which the employer failed in its statutory duty to prevent and remedy gender discrimination. This means that the employer cannot be passive but is called upon not only to remedy but to 'eliminate' gender discrimination in the workplace. The employer is thus under a legal obligation to 'treat every complaint as a legitimate one'

¹⁹ Cochran *op cit* (n6) 140.

²⁰ Le Roux *supra* (n18) 6. See also the United States Court of Appeals judgment in *Burlington Industries Inc v Ellerth* 524 US 742 (1998) at 759, where the court held that direct liability on the part of the employer will ensue with respect to sexual harassment 'if it knew or should have known about the conduct and failed to stop it.'

including 'those that are obviously bogus, and to treat each with the same degree of seriousness and professionalism' as the 'most credible claims'.²¹

MacKinnon correctly states that the basis for vicarious liability is that 'individuals empowered by and within institutions are the institution' and 'they get much of their power to discriminate, and to harm through discrimination, from the institution' and as such 'when they discriminate, the institution discriminates'.²² MacKinnon's view is consistent with section 60(3) of the EEA in that when the employer fails to act against gender discrimination, the employee's discriminatory act is deemed to be the employer's discriminatory act.

The importance of the 2005 Code, albeit only relevant as a 'guide', cannot be understated in that it is a risk management tool, which assists the employer in ensuring compliance with the provisions of the EEA by taking reasonable steps to eliminate unlawful discrimination and promote gender equality in the workplace. Similarly, in the United Kingdom the Code of Practice on Sex Discrimination in Employment²³, has been produced by the Equal Opportunities Commission (EOC)²⁴ which recommends that 'particular care is taken to deal effectively with all complaints of discrimination, victimisation or harassment' and 'it should not be assumed that they are made by those who are over-sensitive'.²⁵

The employer owes its employees a non-delegable duty of care to ensure elimination of discriminatory conduct in employment. This shows an overlap between law of delict (duty of care) and labour law (EEA). The basis of vicarious liability in terms of the EEA is a 'breach of the obligation' by the

²¹ D Orlov and MT Roumell *What Every Manager Needs to Know about Sexual Harassment* (1999) at 77.

²² CA MacKinnon *Women's Lives, Men's Laws* (2005) at 183.

²³ Issued in 1985.

²⁴ In terms of section 58(A)(1) of the Sex Discrimination Act 1975.

²⁵ www.eoc.org.uk (accessed 4 December 2006).

employer to 'assist the victim by taking steps to prevent the harassment'.²⁶ It is interesting to note that vicarious liability is a no-fault liability yet the employer under the EEA is allowed to raise an affirmative defence to prove that it was scrupulously diligent in preventing and correcting sexual harassment.

It is suggested that *statutory* vicarious liability in terms of section 60 of the EEA is therefore not entirely strict and 'is not intended to be absolute'²⁷ since the employer can escape liability by proving reasonable steps and 'adequate pro-active measures should stand the employer in good stead'.²⁸ This means that in terms of section 60(4) of the EEA, the employer has to guard against an alleged negligent breach of standard of care (deemed fault). This shifts focus from the wrong committed by the employee to the conduct of the employer in enhancing or preventing harm caused by the wrongful conduct. Therefore, section 60 'provides for vicarious liability on the part of employers only where the employer fails to take necessary steps to eliminate the alleged sexual harassment'.²⁹

Relief in terms of section 60 of the EEA was sought in *Ntsabo*³⁰ where the applicant, a security guard, resigned after being sexually harassed by her supervisor, Dlomo. The factors surrounding her resignation were that Dlomo suggested to her that they engage in an intimate relationship. She refused this upon which, she stated, her supervisor threatened to tender a 'negative work performance' report about her. He carried out his threat and complained about her bad work performance, that she was not wearing the prescribed

²⁶ J Grogan 'Workplace Harassment: The Highest Courts Speak' (2004) 20 *Employment Law* 3 at 6.

²⁷ Le Roux *op cit* (n18) 7.

²⁸ *Ibid.* See also Y Slabbert *Sexual Harassment in the Workplace* (1994) Unpublished LLM Dissertation, University of Cape Town at 70, correctly supports the pro-active approach to sexual harassment 'to create public awareness of the incidence and impact of sexual harassment' and opines that the peril of sexual harassment in the workplace should be dealt with 'by addressing the root of the problem and not just the consequences thereof after it has occurred'.

²⁹ *Christian v Colliers* [2005] 11 BLLR 1066 (LC) at 1071.

³⁰ *Supra* (n12).

uniform and that she was making tea for the other guards. Dlomo also touched her breasts, thighs, buttocks, and genital area when they were in the guardroom and pulled her skirt. Dlomo also simulated sexual intercourse on her person during which he ejaculated on her dress. He had a firearm and threatened to shoot her if she told anyone about the incident. Dlomo was thus 'enacting and thereby reinforcing and perpetuating gender norms that positioned him as a supervisor as a masculine sexual conqueror' and her subordinate, Ntsabo, as 'feminine sexual conquest'.³¹

She was then reassigned to a night shift. She then complained that she would be unable to carry out shift duty, upon which the employer suggested that if that is the case, she must resign. She tendered her resignation citing her problem with Dlomo as a reason of her termination of employment. The employer tore up that letter and asked her to write another one citing her mother's illness as a reason of her termination of employment. The employer's approval of Ntsabo's night shift in such circumstances was held to be in breach of section 60(2) and (3) and merely served to co-operate with the perpetrator, rather than oppose and protect Ntsabo from gender discrimination. The court correctly held that since sexual harassment was brought to the attention of the employer who did not attend to the issue as envisaged in subsection 60(2) of the EEA, the actions of the employer contravened the provisions of section 60(3) of the EEA.³²

It is suggested that Dlomo used his dominant position as a supervisor to victimize and discriminate against Ntsabo taking advantage of his organizational power. Furthermore, it is argued that Dlomo's capacity to harass Ntsabo was enhanced by the fact that as a supervisor, he was a representative of the employer, revered by his subordinates, and had power to inflict economic harm on Ntsabo. It is for this reason that the United States courts adopted a supervisory approach, as a fitting response to deal with

³¹ KM Franke 'What is Wrong with Sexual Harassment' (1997) 49 *Stan L Rev* 691 at 766.

³² *Supra* (n12) at 94.

sexual harassment in the workplace, to truly capture the essence of the risk of abuse of power and trust inherent in the supervisor's delegated power.³³ This means that in many instances, sexual harassment would not have occurred but for the supervisor's dominant authority and organizational power. It is submitted that it is far easier to stand up to a harassing co-worker than to stand up to a supervisor who is in a superior position in the organization and on whose hands one's livelihood, performance appraisal, and career direction and progress depends.

The employer's failure to deal with Ntsabo's sexual harassment contravened the provisions of section 6(1) and 6(3) of the EEA since the harassment experienced by the applicant was sexual harassment in terms of the EEA.³⁴ The employer merely left Ntsabo at the perpetrator's mercy and failed in its duty of care towards Ntsabo and this meant that the employer was guilty of unfair discrimination in its personal capacity in failing to protect Ntsabo. It is for this reason that the court rightly held that the employer 'did or, at best, ought to have foreseen the development of hostile and intolerable working environment in the circumstances' and was directly liable in its failure to act on allegations of sexual harassment and for constructive dismissal.³⁵

The court held further that for the purpose of the EEA, failure of the respondent to attend to the problem of sexual harassment brought the whole issue within the bounds of unfair discrimination on grounds of gender.³⁶ The employer was thus held vicariously liable for supervisory harassment. It is argued that a court finding of both personal liability and vicarious liability on the part of the employer is not a contradiction and does not confuse the legal principles. It is part of the section 60(3) enquiry to establish deemed fault on

³³ See ch 7.4.3 on the discussion of supervisory approach to sexual harassment in the United States.

³⁴ *Supra* (n12) at 95.

³⁵ *Supra* (n12) at 93.

³⁶ *Supra* (n12) at 95.

the part of the employer by assessing the extent to which the employer failed to comply with its statutory obligations in terms of section 60(2). It is for this reason that *statutory* vicarious liability in terms of section 60 of the EEA is a powerful remedy for victims of sexual harassment.

6.2.2 The affirmative defence in terms of the Employment Equity Act

It is emphasized that the employer will be immune from *statutory* vicarious liability in terms of section 60 of the EEA if it proves that it discharged its statutory duty and obligations by preventing, dealing, and eliminating sexual harassment. This means that the employer must 'design and enforce policies that are actually effective at preventing sexual harassment rather than simply bullet-proofing themselves for a potential claim down the road'.³⁷ The employer is cautioned that proof of inadequate and inefficient steps taken fall short of meeting the standard of care expected of the employer in terms of section 60 of the EEA. On the contrary, the employer must prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA.

6.2.2.1 Section 60(4) of the Employment Equity Act

In terms of section 60(4) an employer will be immune from liability if that employer is able to prove that it did all that was reasonably practicable to ensure that its employees would not act in contravention of section 6(1) of the EEA, which prohibits gender discrimination in the workplace. Section 60 of the EEA is distinguishable from the affirmative defence in English law whereby an employer will not be vicariously liable, whether or not it was done with its knowledge or approval, for the acts of its employees if the

³⁷ TM Beiner *Gender Myths V Working Realities: Using Social Science to Reformulate Sexual Harassment Law* (2005) at 205.

employer proves that he took such steps as are reasonably practicable to prevent sexual harassment from occurring in its employees' course and scope of employment.³⁸

It must be noted that English law *statutory* vicarious liability, unlike the EEA, has a disadvantage of being linked to *common-law* 'course of employment'.³⁹ This distinguishes section 60 of the EEA from section 41 of the Sex Discrimination Act of 1975 ("SDA") in terms of which *statutory* vicarious liability includes the 'scope of employment' thereby creating a risk of English courts importing *common-law* rules of vicarious liability as guidance to the statutory remedy. Relief in terms of the SDA is thus more demanding in that the plaintiff has an extra hurdle to overcome by establishing course of employment, than a plaintiff seeking remedy under section 60 of the EEA.

The uniqueness of *statutory* vicarious liability in section 60 of the EEA will enable the courts to give effect to the letter and spirit of the EEA 'with a mind unclouded by any parallels sought to be drawn from the law of vicarious liability' in delict.⁴⁰ In the English case of *Jones v Tower Boot Co Ltd*⁴¹, the enquiry before the court was whether the conduct complained of was done in the course of employment, for the purposes of section 32 of the Race Relations

³⁸ S 41 of the Sex Discrimination Act of 1975 reads:

- (1) Anything done by a person in the course of his employment shall be treated for the purposes of this Act as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.
- (2) Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this Act as done by that other person as well as by him.
- (3) In proceedings brought under this Act against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.

³⁹ See ch 7 on the discussion of the 'scope of employment' test under the principle of vicarious liability and how it was narrowly applied by the courts to deny protection for the victims of sexual harassment by regarding sexual harassment as a 'frolic of one's own', 'personal' and as being 'not part of the job description' or *modus operandi* to sexually harass.

⁴⁰ *Jones v Tower Boot Co Ltd* *supra* (n7) at 416.

⁴¹ *Ibid.*

Act 1976 and the corresponding provisions in section 41 of the Sex Discrimination Act of 1975. Waite LJ applied a purposive approach and held that words in the 'course of employment' should be interpreted in the sense in which they are employed in everyday speech and not restrictively by reference to the principles laid down by case law for establishing an employer's vicarious liability for the torts committed by an employee. The court correctly held that to do so would seriously undermine the statutory scheme of the Discrimination Acts and flout the purposes, which they were passed to achieve. The employer is under a statutory obligation in terms of section 5 of the EEA to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

'To take steps'⁴² and 'comply with the provisions of this Act'⁴³ means 'something more' is expected from the employer than being reactive when an incident of sexual harassment occurs. The 2005 Code introduces further duties on the employer as follows:

- a) Employers should create and maintain a working environment in which the dignity of employees is upheld and respected;⁴⁴
- b) Employers should take appropriate action to address and eliminate sexual harassment;⁴⁵
- c) Employers should adopt a sexual harassment policy and communicate its contents to employees;⁴⁶ and
- d) Employers should grant additional paid sick leave in cases of serious sexual harassment where the employee's sick leave entitlement has been exhausted.⁴⁷

⁴² S 5 EEA.

⁴³ S 60(2) EEA.

⁴⁴ Item 6 2005 Code.

⁴⁵ Items 6 and 8.2 2005 Code.

⁴⁶ Item 7 2005 Code.

The duties outlined above make it clear that the employer is called upon to uphold the letter and spirit of the EEA by being pro-active and taking reasonable steps to maintain a harmonious working environment, which is free from sexual harassment, protecting the welfare and rights of the employees, and preventing sexual harassment. The affirmative defence is thus more likely to succeed if the employer is pre-emptive by upholding a culture of *ubuntu* in its workplace, which promotes respect, integrity, and dignity of the employees, and a no-nonsense zero tolerance to sexual harassment in the workplace. This view is consistent with the pro-active approach adopted in *Media 24 Limited, Gasant Samuels v Sonja Grobler*⁴⁸ where the court extended the basis of an employer's duty to prevent sexual harassment in the workplace and to compensate the victim for harm negligently caused, to the legal convictions of the community, which are not dependent on the contract of employment or statutory remedy. Le Roux similarly opines a pro-active approach to section 60(4) and that 'the emphasis ought to be on the employer conduct that preceded the act of discrimination'⁴⁹ which will give the employer 'an absolute defence if, nonetheless, the discrimination happens'.⁵⁰

The affirmative defence that would be sufficient under section 60(4) of the EEA is proof that the employer fostered a culture of zero tolerance to sexual harassment in the workplace as part of its corporate governance. Existence of a sexual harassment policy, which can be implemented effectively, and which not only exists in letter, but also vigorously enforced and communicated to all employees in the workplace is a step in the right direction for the employer to immunize itself from vicarious liability in terms of section 60(4) of the EEA.⁵¹ The employer should therefore establish that he 'did something more than put pen to paper'.⁵²

⁴⁷ Item 10 2005 Code.

⁴⁸ [2005] 7 BLLR 649 (SCA) at para 68.

⁴⁹ Le Roux *op cit* (n18) 26.

⁵⁰ Le Roux *op cit* (n18) 31.

⁵¹ Item 7.3 2005 Code.

⁵² Orlov and Roumell *op cit* (n21) 189.

It is argued that emphasis is not only on the preventative measures (pro-active) but on remedial measures adopted as well. In order to escape liability in terms of section 60(4) of the EEA, the employer is not only called upon to prevent sexual harassment from occurring, but is also called upon to come to the employee's rescue once gender discrimination occurs and act promptly with a view to deal and remedy gender discrimination. It is suggested that the pro-active and reactive approaches are thus two sides of a coin, which are both of fundamental importance to the employer to successfully raise the affirmative defence in terms of section 60(4) of the EEA.

Le Roux correctly opines that if a reactive approach is adopted, 'employers will fail to see the need to take any pro-active steps and will rather deal with discrimination as and when it arises, an approach that would undermine the purpose of the EEA'.⁵³ It is suggested that a reactive approach signifies lack of commitment to the elimination of gender discrimination and falls short of putting safeguards against gender discrimination and taking preventative steps, which would help, educate, and change the employees' attitudes to the harm of sexual harassment. It is submitted that the preventative steps are cost effective compared to damages which an employer could be called upon to pay, if he were to be found liable for failure to prevent and remedy sexual harassment.

In *Ntsabo*⁵⁴ the employer stood no chance of successfully raising the affirmative defence as it was neither pro-active nor reactive in its approach as it did nothing in its workplace to prevent sexual harassment and turned a blind eye to sexual harassment despite several complaints lodged by Ntsabo. Furthermore, the employer acted unreasonably in handling the matter in a manner that would insulate it from liability under section 60(4).

⁵³ Le Roux *op cit* (n18) 30.

⁵⁴ *Supra* (n12). See also *Fall v Indiana University Bd of Trustees* 12 F Supp 2d 870 (ND Ind 1998) where the federal court noted that the affirmative defence requires the employers to prove two necessities and is not framed in the alternative with the use of 'or' but has a conjunction (to prevent) 'and' (correct promptly).

*Ntsabo*⁵⁵ is distinguishable from a United States judicial precedent in *Bernard v Calhoon MEBA Engineering School*⁵⁶ where the court gave judgment in employer's favour on grounds that he had acted promptly in response to a harassment charge despite the deficiency in its internal sexual harassment policy. Bernard complained to a supervisor that a co-worker made racially offensive remarks. The supervisor immediately relayed that complaint to the human resources manager, sought out the co-worker, and made him apologize. On the facts, the human resources manager came to the school the next day to address the complaint; met with the co-worker, secured his promise to stop his remarks; and was warned that he would be disciplined if he did not stop. The court found that these prompt actions worked because Bernard did not report any further offensive remarks by co-workers.

It is suggested that the court will grant immunity from vicarious liability to the employer who displays commitment to eliminating gender discrimination in the workplace; takes reasonable and prompt steps to protect his employees; and treats each complaint with seriousness, merit, and attention it deserves. Reasonable steps, which are expected in terms of section 60(4) of the EEA to insulate the employer from being held vicariously liable, include a minimum of the following guidelines contained in the 2005 Code:

- a) A sexual harassment policy must be communicated to the staff members;⁵⁷
- b) Sexual harassment must be outlined as a form of gender discrimination which infringes the rights of the employees and constitutes a barrier to equity in the workplace;⁵⁸

⁵⁵ *Ibid.*

⁵⁶ 309 F Supp 2d 732 (D Md 2004).

⁵⁷ Item 7.2 2005 Code.

⁵⁸ Item 7.4.1 2005 Code.

- c) A grievance procedure with clear lines of communication and reporting must exist, and must spell out that appropriate action must be taken by the employer;⁵⁹ and
- d) It must be stated that it is a disciplinary offence to victimise or retaliate against complainants.⁶⁰

The following additional reasonable steps are suggested as part of the employer's duties and obligations to prevent and deal with sexual harassment in the workplace and insulate itself from *statutory* vicarious liability in terms of section 60 of the EEA:

- a) The employer must adopt awareness training programmes which serve to sensitise the employees to the harm of sexual harassment;⁶¹
- b) The sexual harassment policy must clearly outline the nature of sexual harassment; examples of forbidden behaviour; what makes it intolerable in the workplace and sanctions for committing sexual harassment.
- c) The employer must undertake special training for the supervisors and managers on how they must treat their subordinates in a way that does not abuse their authority and power thereby poisoning the workplace;
- d) The employer must appoint a sexual harassment officer or a human resources officer responsible for monitoring compliance with the sexual harassment policy;⁶²

⁵⁹ Items 7.4.3 and 7.5 2005 Code.

⁶⁰ Item 7.4.4 2005 Code.

⁶¹ See also *Shellharbour Golf Club v Wheeler* (1999) New South Wales Supreme Court 224, the Tribunal found that the fact that the employer had a sexual harassment policy did not prevent it from being vicariously liable for the actions of the president, as the Tribunal found that the policy was merely displayed on a notice board, rather than being the subject of discussions or training with staff.

⁶² See also *Hopper v Mt Isa Mines Ltd & others* (1997) EOC92-87 is an Australian precedent for the proposition that even where the employer has a relevant sexual harassment or anti-discrimination policy, unless the employer takes reasonable and efficient steps to police and enforce that policy, then the employer is failing in its obligations to its employees and will be held responsible for any discriminatory acts.

- e) The employer must therefore foster a culture in which complaints will not be trivialised.

Guidance on the 'affirmative defence' can also be sought from English law. In the United Kingdom, the Employment Appeal Tribunal in *Caniffe v East Riding of Yorkshire Council* held that the proper approach to considering whether there is a 'reasonable steps' defence is:

- a) to identify whether the respondent took any steps at all to prevent the employee, from doing the act or acts complained of in the course of his employment;
- b) having identified what steps, if any, they took to consider whether there were any further acts, that they could have taken, which were reasonably practicable.⁶³

The Employment Appeal Tribunal held that the employer will not be immune 'if it has not taken reasonable steps simply because if he had taken those reasonable steps they would not have led anywhere or achieved anything or in fact prevented anything from occurring'.⁶⁴ This reasoning is of relevance in the context of section 60 of the EEA, in that the employer is statutorily obliged to take steps even though in its own assessment the taking of such steps will be a futile exercise.

6.3 Empowering provisions in awarding a remedy for sexual harassment under the Employment Equity Act

The plaintiff, who has framed her cause of action for sexual harassment on grounds of gender discrimination under the EEA, can claim compensation for pure economic loss and damages for intangible loss, which entails an impairment of dignity, *contumelia*, *iniuria*, sentimental loss, pain, and suffering, in terms of section 50 of the EEA. Section 50(2) of the EEA empowers the Labour Court to award:

⁶³ 2000 WL 877667 (EAT) at para 14.

⁶⁴ *Ibid.*

(a) Compensation,

(b) Damages and

(c) Order directing employer to take preventative measures.

Section 50 requires the court to make an appropriate order that is just and equitable in the circumstances. The factors to be taken into account were considered in *Christian v Colliers Properties* as enjoining the court to:

...consider various interests, including the need to redress the wrong caused by the infringement, the deterrence of future violations, the dispensation of justice which is fair to all those who might be affected, and the necessity of ensuring that the order can be complied with.⁶⁵

In *Christian v Colliers Properties*⁶⁶ the court awarded the plaintiff a total of R58 000 (R48 000 in terms of section 194(3) of the LRA and R10 000 in terms of section 50 of the EEA). In reaching this quantum, the court took into account the following:

- a) The acts complained of occurred on the same day and within a short space of time;
- b) The only physical advance was the defendant's attempt to kiss the plaintiff on her neck; and
- c) There was no evidence of severe emotional and psychological trauma or consequences.⁶⁷

It is emphasized that the plaintiff can claim under both the LRA and EEA. The plaintiff can plead unfair dismissal/automatic unfair dismissal under the LRA and claim maximum compensation permissible in terms of section 194 of the LRA; and plead unfair discrimination and claim damages and compensation, which are not capped in terms of section 50 of the EEA. This is evident in *Ntsabo*⁶⁸ where the court awarded the plaintiff a total of R82 000 (R12, 000 in respect of unfair dismissal in terms of the LRA, R20 000 for future medical costs and R50 000 for general damages including *contumelia*, pain and suffering, emotional or psychological trauma and the loss of amenities of life in terms of the EEA). It is highlighted that the award of damages for *contumelia* (sentimental loss) is a matter to be heard by the Labour Court

⁶⁵ Supra (n29) at 483G-H.

⁶⁶ *Ibid.*

⁶⁷ Supra (n29) at 485E.

⁶⁸ Supra (n12).

under the section 50 of the EEA and not under the LRA. In terms of section 46(9)(c) of the Labour Relations Act⁶⁹ ('old LRA') the plaintiff could claim sentimental loss as part of her case for unfair labour practice.

In *Intertech Systems (Pty) Ltd v Sowter*⁷⁰ the court awarded the plaintiff an amount equivalent to 12 months salary or R92, 088. This case was brought for an unfair labour practice ruling in terms of section 46(9)(c) of the old LRA but is important in highlighting the considerations that the court takes into account when determining an award regarding compensation for sexual harassment. In awarding compensation, the court found that the company's conduct towards the employee had been 'reprehensible and insupportable, and its conduct of its case in the industrial court had been lamentably disingenuous'.⁷¹ The court thus felt that the plaintiff had to be compensated for the egregious invasion of her employment security and affront to her dignity, which the company perpetrated because of sexual harassment.⁷² The court therefore took into account non-patrimonial loss occasioned by sexual harassment, when awarding compensation.

The distinction between 'compensation' and 'damages' (including both patrimonial and sentimental loss) in section 50 of the EEA, must be noted. In *Harmony Furnishers v Prinsloo*⁷³ Foxcroft J held that the word 'damages' is merely a synonym for 'compensation'. However, section 50 of the EEA differentiates between 'payment of compensation'⁷⁴ and 'payment of damages'.⁷⁵ It is also interesting to note that in *Sibiya v Num*⁷⁶ the Industrial Court referred to the word 'damages' in the context of 'non-monetary damages'. It is suggested that this means that 'damages' in the context of the EEA signify intangible loss.

⁶⁹ 28 of 1956.

⁷⁰ (1997) 18 ILJ 689 (LAC).

⁷¹ Supra (n70) at 705G.

⁷² Supra (n70) at 706D.

⁷³ (1993) 14 ILJ 1466 (LAC) at 1469.

⁷⁴ S 50(2)(a) EEA.

⁷⁵ S 50(2)(b) EEA.

⁷⁶ [1996] 6 BLLR 794 (IC) at 804.

'Compensation' in section 194 of the LRA is capped and restricted to no more than 12 months for unfair dismissal and a maximum of 24 months remuneration for automatically unfair dismissal. In the context of the LRA, it is emphasized that 'compensation' can be understood to mean pure economic loss and non-monetary loss, which is discretionary to the court since *iniuria* (often involved in sexual harassment), is not capable of mathematical precision. Similarly, in delict 'damages' encompass payment for patrimonial loss as well non-patrimonial loss, which would otherwise be separately dealt with under 'payment of compensation' and 'payment of damages' in section 50 of the EEA.

The concept of 'damages' means the 'diminution, as a result of a damage-causing event, in the utility or quality of a patrimonial or personality interest in satisfying the legally recognized needs of the person involved'⁷⁷ and implies a 'comprehensive concept with patrimonial and non-patrimonial loss as its two mutually exclusive components'.⁷⁸ In delict, compensation is used to denote 'the process of reparation or restoration of any patrimonial or non-patrimonial loss'.⁷⁹ This means that in delict, 'damages' and 'compensation' are used interchangeably whereby damages encompass the monetary recompense for any tangible and intangible loss. Under the EEA, the plaintiff is paid either damages (intangible loss which encompasses impairment of dignity, *contumelia*, *iniuria*, sentimental loss, pain and suffering) or compensation (pure economic loss) - or awarded both under separate headings.

It is underscored that a claim for sentimental loss under section 50(2)(b) of the EEA is not subject to the delictual rules governing the *actio iniuriarum* as defined in *De Lange v Costa*⁸⁰ - that is to say, an unlawful, impairment of

⁷⁷ PJ Visser and JM Potgieter *Visser and Potgieter's Law of Damages* 2ed (2003) at 24.

⁷⁸ WA Joubert *The Law of South Africa* 1995(7) at para 10. See also J Neethling and PJ Visser *Law of Delict* 5ed (2006) at 197.

⁷⁹ Joubert *op cit* (n78) para 16.

⁸⁰ 1989 (2) SA 857 (A) at 681.

dignity inflicted with *animus iniuriandi*. Factors affecting a delictual *assessment of damages* for sentimental loss come into play to the extent to which they will enable the court to make an appropriate order which is just and equitable as prescribed by section 50(2)(b) of the EEA. It is stressed that the requirements for claiming damages under section 50(2)(b) of the EEA are less demanding to establish than in the *actio iniuriarum* in that sentimental loss is assessed from the cumulative effect of the circumstances surrounding sexual harassment and the adverse effects of the sexual harassment experience on the plaintiff. For instance in *Ntsabo*,⁸¹ the indignity suffered by the applicant was inferred from the following:

- a) The fact that Dlomo simulated sexual intercourse on the applicant; the embarrassment she experienced in having to attend psychiatric clinics;
- b) The employer's failure to act when sexual harassment was reported by the applicant;
- c) The emotional and psychological trauma she suffered; and
- d) An unacceptable invasion of the applicant's privacy and her constitutional rights.

However, section 50(2)(b) of the EEA is compatible with the objective test to impairment of dignity in *De Lange*⁸² in that a finding of *contumelia* under section 50(2)(b) involves an objective factual enquiry.

6.4 Dismissal

It has been highlighted that sexual harassment is a specific form of gender discrimination which amounts to unfair discrimination; unfair labour

⁸¹ Supra (n12).

⁸² Supra (n80).

practice; affront to right to dignity; violation of the right to equality; and inimical to the values underlying the Constitution. It is proposed that as part of the employer's corporate responsibility in the spirit of corporate governance, sexual harassment should constitute misconduct warranting dismissal of the perpetrator. A claim for constructive dismissal will also be discussed highlighting reasons why it is not a viable remedy for automatically unfair dismissal in terms of section 187(1)(f) of the LRA read with section 186(1)(e).

6.4.1 Unfair dismissal

Section 185 of the LRA prohibits unfair labour practice and reiterates that:

- 1) Every employee has a right not to be unfairly dismissed.

Automatically unfair dismissal provides for a more stringent and punitive award of not more than the equivalent of 24 months remuneration which is in excess of the normal 12 months remuneration compensation for other kinds of dismissals.⁸³ The court held in *Ntsabo*⁸⁴ that the applicant's dismissal could not be described as being based on discrimination from a LRA point of view, since her dismissal was not linked to discrimination. Instead, the court held that the employer's failure to deal with the matter therefore constituted discrimination within the meaning of that term in the EEA.

On the other side of the coin lies a perpetrator who alleges unfair dismissal because of committing sexual harassment. The court in *Reddy v University of Natal*⁸⁵ treated sexual harassment as a form of misconduct justifying dismissal and found dismissal as a justifiable remedy in the circumstances. Conduct of sexual harassment may be considered serious

⁸³ S 194(1) LRA caps compensation at not more than an equivalent of 12 months remuneration for unfair dismissal. S 194(3) LRA provides for compensation, which is not more than the equivalent of 24 months' remuneration for automatically unfair dismissal.

⁸⁴ *Supra* (n12).

⁸⁵ [1998] 1 BLLR 29 (LAC) at 32.

enough to warrant dismissal where such acts are likely to bring the employer and business into disrepute, and undoubtedly have dire repercussions in the workplace.⁸⁶

The 2005 Code states that 'the employer's sexual harassment policy should specify disciplinary sanctions that may be imposed on a perpetrator'.⁸⁷ The 2005 Code is consistent with Rubenstein's recommendation that 'violations of the organization's policy should be treated as a disciplinary offence and the disciplinary rules should make it clear what is regarded as inappropriate behaviour at work'.⁸⁸ This means that the employer has:

an affirmative duty to investigate complaints of sexual harassment and deal appropriately with the offending personnel...the failure to investigate gives tacit support to the discrimination because the absence of sanctions encourages abusive behaviour.⁸⁹

It is suggested that dismissal of the perpetrator will thus be a fitting response to misconduct because sexual harassment renders the employment relationship 'intolerable' and is the test of fairness in dismissal for misconduct (such as sexual harassment).

It is essential that the employer must take disciplinary action against the perpetrator, and not condone or tacitly approve sexual harassment, in order to discharge its personal obligations in terms of section 60(2) of the EEA, which enjoins it to 'take the necessary steps to eliminate the alleged conduct and comply with the provisions' of the EEA.

6.4.2 Constructive dismissal

Constructive dismissal is a form that dismissal may take, which may or may not be unfair (though it usually is) and may give rise to a claim of unfair dismissal. In the present context, it offers a statutory basis on which a victim

⁸⁶ *NEHAWU obo Barnes v Department of Foreign Affairs* [2001] 6 BALR 539 (P) at 542.

⁸⁷ Item 8.8 2005 Code.

⁸⁸ M Rubenstein 'Sexual Harassment: European Commission Recommendation and Code of Practice' (1992) 12 ILJ 70 at 73.

⁸⁹ *Munford v James T Barnes and Co* 441 F Supp 459 (ED Mich 1977) at 466.

of sexual harassment who has been driven from her job may seek a remedy for automatically/unfair dismissal.⁹⁰ The purpose of exploring this remedy is to ensure that the plaintiff is not without recourse when she has suffered sexual harassment to a point where she has been left with no option but to resign. Furthermore, constructive dismissal is in breach of the employee's right not to be unfairly dismissed and subjected to unfair labour practice, which is entrenched in section 185 of the LRA.

The remedy for automatically unfair dismissal on grounds of constructive dismissal may be sought in terms of section 187(1)(f) of the LRA (read with section 186(1)(e) of the LRA) which states that dismissal is automatically unfair if:

'the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility'.

Section 186(1)(e) of the LRA endorses the principle of constructive dismissal under a meaning of 'dismissal' and is defined as follows:

(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

Section 186(1)(e) of the LRA bears resemblance to the English law on constructive dismissal as contained in 95(1)(c) of the Employment Rights Act 1996 which provides:

An employee is dismissed by his employer if -

the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

It is clear from the definition above that constructive dismissal is coerced by the conduct of the employer, as compared to an employee's unilateral and voluntary resignation. Grogan⁹¹ states that the test for constructive dismissal rests on the employee to establish the following:

(a) Whether the employee brought the contract to an end;

⁹⁰ S 187(1)(f) of the LRA read with s 186(1)(e).

⁹¹ J Grogan *Dismissal, Discrimination & Unfair Labour Practice* (2005) at 157.

- (b) Whether the reason for the employee's action was that the employer had rendered the prospect of continued employment 'intolerable';
- (c) Whether the employee had no reasonable alternative other than terminating the contract.

In *Ntsabo*⁹² the plaintiff endured a hostile environment as a result of sexual harassment by her supervisor, which the employer did nothing to rectify. The court held that to ground constructive dismissal, employer conduct becomes intolerable only when the employee has exhausted the means she might reasonably be expected to employ to put a stop to it. The court concluded that on the facts, Ntsabo's case fell within the situation envisaged by section 186(1)(e) of the LRA in that:

- a) The inaction of the employer after Ntsabo had complained about her supervisor sexual harassment poisoned the working environment and it became intolerable for her to continue employment;⁹³
- b) She was then compelled to terminate her contract of employment and her consequent resignation was coerced in that the respondent did or are at best ought to have foreseen the development of a hostile and intolerable working environment in the circumstances;⁹⁴ and
- c) The employer did nothing to safeguard against the creation of a hostile and abusive working environment.⁹⁵

In order to establish constructive dismissal, the employee's resignation must be causally linked to the employer's conduct. If the employee would in any event have resigned, she cannot claim constructive dismissal. It is submitted that the conduct contemplated in terms of section 186(1)(e) of the LRA does not refer exclusively to pro-active conduct by the employer but includes reactive conduct which entails omission by the employer to deal with an unbearable and intolerable situation once it has come to its attention.

⁹² *Supra* (n12).

⁹³ *Ibid.*

⁹⁴ *Ntsabo supra* (n12) at 92-3.

⁹⁵ *Ibid.*

6.4.2.1 Employer repudiation of an employment contract

It is highlighted that to ground constructive dismissal, the employer's conduct must breach the essence of the employment contract so as to reasonably conclude that he no longer intends to be bound by the contract of employment but has instead opted to repudiate the contract of employment. Lord Denning summarised the English law on constructive dismissal in a leading case of *Western Excavating (ECC) Ltd v Sharp*⁹⁶ as follows:

If an employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, the employee is entitled to treat himself as being discharged from further performance. If he does so, then he terminates the contract by reason of the employer's conduct and he is constructively dismissed.

It is emphasized that the employer must thus conduct himself so as to repudiate the employment contract and evince intention to be absolved from the contract.

6.4.2.2 Breach of trust

Sexual harassment also constitutes a breach of the trust, which lies at the heart of an employment relationship and makes a continued relationship between the perpetrator, the victim, and other female colleagues intolerable.⁹⁷ Sexual harassment is hazardous to a harmonious working environment and can lead to constructive dismissal if left unattended by the employer.

In *Pretoria Society for the Care of the Retarded v Loots*⁹⁸ Nicholson JA stated that to ground constructive dismissal, the enquiry is whether the appellant, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The court held that it

⁹⁶ [1978] QB 761 at 769.

⁹⁷ *Gerbber v Algorax (Pty) Ltd* [2000] 1 BALR 41 (CCMA) at 52-3.

⁹⁸ [1997] 6 BLLR 721 (LAC) at 725.

is not necessary to show that the employer intended repudiation of the contract; the court's function is to look at the employer's conduct as a whole and determine whether its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.⁹⁹ Intention on the part of the employer is thus not part of the constructive dismissal enquiry but the employer's conduct is assessed objectively on the facts.

The requirements for a successful claim of constructive dismissal were further set out by the court that an employee is required to prove that:

- a) Her situation had become so intolerable that she was unable to work;
- b) She would have continued working indefinitely had the employer not created the unbearable situation;
- c) She resigned because she did not believe that the employer would reform or abandon the pattern of creating an unbearable work environment.¹⁰⁰

Conduct becomes intolerable only when the employee has exhausted all the means and avenues she might reasonably be expected to employ to put a stop to sexual harassment. The conduct of the employer must reach such degree and proportions to destroy the trust and confidence between the employer and employee. Therefore, facts must lead the court to conclude that resignation was a natural progression of the events that ensued in that the employee had no choice but to resign. It is for this reason that constructive dismissal is a remedy available to victims of sexual harassment.

6.4.2.3 The employee must leave at once

The employee must leave at once in that her resignation must follow immediately after the conduct of the employer in failing to deal with sexual harassment after it was brought to its attention. This means that constructive dismissal is end-result behaviour of employer's conduct. If the employee does not resign pursuant to employer's failure to prevent or remedy sexual

⁹⁹ *Ibid.*

¹⁰⁰ *Loots supra* (n98) at 724.

harassment, then she will lose her right to claim constructive dismissal and will be taken to have affirmed the contract despite the breach thereof by the employer.

The court in *Western Excavating (ECC) Ltd v Sharp*¹⁰¹ held that the employee must respond at once and resign immediately after the employer has displayed its intention to no longer be bound by the contract, as follows:

The employee is entitled in those circumstances to leave at the instant without giving any notice at all or... he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains. For, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

An instructive principle, which has been established in this English case as a guide to the South African context, is that time is of essence in constructive dismissal in that the employee must act and report instantly the employer conduct complained of and not condone his conduct. Therefore, the plaintiff cannot resign at a later stage for other reasons unrelated to sexual harassment and claim constructive dismissal as a reason for sexual harassment, which occurred in the past. 'Leaving at once' is thus of relevance to the plaintiff when establishing that the employer conduct rendered continued employment 'intolerable' in terms of section 186(1)(e) of the LRA. In *Ntsabo*¹⁰² by citing *Pretoria Society for the Care of the Retarded v Loots*, *CEPPWAWU and Another v Glass Aluminium cc*, and *Kruger v CCMA and Another*¹⁰³, the court reasoned that the conduct of the employer must be so unbecoming and intolerable that the employee cannot fulfil what is the employees most important function, namely to work. It follows that in order to ground a successful claim of constructive dismissal, the plaintiff must

¹⁰¹ *Supra* (n96) at 769.

¹⁰² *Ntsabo supra* (n12) at 92.

¹⁰³ *Loots supra* (n98); *CEPPWAWU and Another v Glass Aluminium cc* [2002] 5 BLLR 399 (LAC); and *Kruger v CCMA and Another* [2002] 11 BLLR 1081 (LC).

prove that on the facts, there was 'unfair and wrongful conduct by the employer that drives the employee to resign'.¹⁰⁴

6.4.2.4 Supervisor harassment

Abuse of supervisory authority can lead to constructive dismissal. In *Ntsabo*¹⁰⁵ the supervisor had abused his organizational power and dominant position by harassing his subordinate. Ntsabo was a victim of her supervisor's abuse of power, which is an aggravating circumstance because Ntsabo was at her supervisor's mercy and he was in a position to discriminate and alter her terms of employment in the event of her refusing to co-operate or lodging a complaint. The court thus correctly held that she was compelled under the circumstances to terminate her contract of employment with the respondent and that the respondent, did or at best, ought to have foreseen the development of a hostile and intolerable working environment in the circumstances.

The position of supervisors as the alter ego of the employer and their dominant and influential position enhance the risk of sexual harassment because they 'generally have greater access to people still higher in the employment hierarchy'.¹⁰⁶ The subordinate is thus placed:

in a lose-lose situation if harassed by a supervisor: she can either accept the harassing behaviour which renders the workplace unpleasant (at the least), or she can protest and risk making the workplace even more unpleasant, if she does not lose her job.¹⁰⁷

Sexual harassment by the supervisor can lead to constructive dismissal in that the supervisor improperly exercises and abuses his dominant authority in implementing a tangible employment detriment and bullying his

¹⁰⁴ D Du Toit, D Bosch, D Woolfrey, S Godfrey, C Cooper, GS Giles, C Bosch and J Rossouw *Labour Relations Law: A Comprehensive Guide* 5ed (2006) at 386.

¹⁰⁵ *Supra* (n12).

¹⁰⁶ R Ehrenreich 'Dignity and Discrimination: Towards a Pluralistic Understanding of Workplace Harassment' (1999) 88 *Geo LJ* 1 at 46. See ch 7.4.3 on the discussion of supervisory harassment.

¹⁰⁷ *Ibid.*

subordinates thereby threatening their continued employment. It is argued that the organizational power of the supervisor makes him the representative of the master who is often revered and thereby puts the subordinate under duress when subjected to sexual harassment, leaving the victim of sexual harassment with no option but to resign.

6.4.2.5 Employer's omission to remedy sexual harassment

The employer must fail to deal with sexual harassment once it is brought to its attention. It is established that what leads to employee's resignation is not sexual harassment per se but it is the employer's failure to protect the harassed employee and remedy sexual harassment once a sexual harassment complaint has been lodged. In some sexual harassment cases, constructive dismissal is responses to retaliatory mechanisms adopted by the employer when it treats a complaint with neglect and thereafter colludes with the perpetrator in aggravating a discriminatory environment. This scenario will make it unlikely for the affirmative defence in section 60(4) of the EEA to be successfully raised by the employer.

In *Intertech Systems (Pty) Ltd v Sowter*¹⁰⁸ the plaintiff reported sexual harassment and the employer failed to deal with it adequately. The harasser was not relocated or discharged from the employment and as such continued to harass the plaintiff. The court found the plaintiff's constructive dismissal to be an unfair labour practice and held that the plaintiff must be compensated for the 'egregious invasion of her employment security and her dignity which the company perpetrated' and reasoned as follows:

The unfair labour practice was both outrageous and egregious. It involved an attack upon Sowter's dignity as an employee; it involved a gross invasion of her stability and security in employment; and it involved a denigration of her employment prospects... The company initially treated her complaint with neglect. Later it colluded with the perpetrator and became accessory to her victimisation. The

¹⁰⁸ (1997) 18 ILJ 689 (LAC).

company showed a singular lack of candour and evasiveness in dealing with Sowter's complaints... In short, the company's conduct towards Sowter was reprehensible and insupportable, and its conduct of its case was lamentably disingenuous.¹⁰⁹

The court thus ordered the employer to pay R92, 088, which was an equivalent of 12 months' salary at the time of her dismissal. It is worth noting that the court highlighted the employer's failure to deal with sexual harassment after it came to its attention, as an aggravating circumstance of its neglect of its responsibility to deal with sexual harassment. The employer's omission to deal with sexual harassment thus impaired the plaintiff's employment security, stability, and dignity. Implied in the court's conclusion is an employer's duty to ensure a safe and discriminatory-free working environment with zero tolerance to sexual harassment. If the employer fails to remedy sexual harassment once it has come to its attention, then it will be deemed to have committed gender discrimination in terms of section 60(3) of the EEA – because through its omission, it thereby endorsed sexual harassment.

In *Ntsabo*¹¹⁰ the court noted that by the time Ntsabo resigned, matters had worsened due to omission on the part of the employer. The employer did nothing to rectify the situation in order to ensure that the risk of sexual harassment to the plaintiff was neutralized.¹¹¹ The court reasoned that all that Ntsabo wanted was to get on with her work without being subjected to sexual harassment and she did all that could reasonably be expected of her in an attempt to hold onto her employment and to avoid being sexually harassed.¹¹² It is emphasized that the employer's display of callousness and neglect in handling sexual harassment in the workplace is a recipe for constructive dismissal.

¹⁰⁹ Supra (n108) at 705E-H.

¹¹⁰ Supra (n12).

¹¹¹ *Ntsabo* supra (n12) at 93.

¹¹² *Ibid.*

6.4.2.6 The affirmative defence in the United States

In the United States, for constructive dismissal to succeed, resignation must be a fitting response pursuant to a creation of a hostile environment. The evidentiary burden is placed on the plaintiff to prove constructive dismissal. The evidentiary burden shifts to the employer once the plaintiff has discharged the onus, to establish a corrective or remedial response to an intolerable situation, which led to constructive dismissal.

Guidance can be obtained from a federal case of *Pennsylvania State Police, Petitioner v Nancy Drew Suders* on the standard test to be applied in constructive dismissal cases where Justice Ginsburg delivered the opinion of the Court as follows:

Beyond that, we hold, to establish 'constructive discharge,' the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus.¹¹³

It is observed that the United States thus takes constructive dismissal a step further and creates an affirmative defence for an employer to be able to prove that it took preventative and remedial actions to safeguard and deal with sexual harassment. The plaintiff must unreasonably have failed to take advantage of the avenues available to her to eliminate or mitigate the occurrence of sexual harassment. That is, the employer can prove that her resignation was unwarranted and did not qualify as an appropriate and fitting response to sexual harassment. In any event, since constructive dismissal hinges on employer conduct, where an employer has conducted itself to protect the plaintiff and remedy a discriminatory environment, then there would be no question of constructive dismissal since employer's preventive response would cure an intolerable situation.

¹¹³ 124 S Ct 2342 (2004) at 2344.

In the United States, the affirmative defence is only available in hostile environment harassment and not in *quid pro quo* harassment resulting in a tangible employment detriment.¹¹⁴ This distinguishes South Africa from the United States in that in South Africa there is no differentiation between the scope of protection and legal redress for forms of sexual harassment. Instead, in South Africa there is equal protection before the law for all irrespective of the form of sexual harassment suffered. Similarly, it is argued that in South Africa, just like in the United States, there is an affirmative defence to constructive dismissal, which is available to the employer. Thompson and Benjamin correctly state that 'in order to show that a situation has become intolerable', the onus is on the employee to 'show that termination of the employment relationship was the only reasonable option in the circumstances'.¹¹⁵ Furthermore, Grogan correctly states that 'where a complaint is such that the employer could, and probably would, have dealt with the cause of the employee's unhappiness', then 'the employee should file a complaint before resigning'.¹¹⁶

Grogan cautions therefore that 'where the employees have failed to file grievances or formally to complain of the treatment which induced them to resign, they are unlikely to persuade arbitrators that they were constructively dismissed'.¹¹⁷ Commissioner Marcus in *Smith v Magnum Security*¹¹⁸ held that the employee must show that 'the conduct of the employer left him/her with no reasonable alternative option other than resignation in the circumstances'. It is for this reason that the plaintiff's claim of constructive dismissal was not upheld in *Coetzer and The Citizen Newspaper*¹¹⁹ where Commissioner Harris found that 'the applicant's resignation was not justified and was premature' since she 'did not exhaust all remedies available to her prior to resigning'.¹²⁰ It

¹¹⁴ *Ibid.*

¹¹⁵ C Thompson and P Benjamin *South African Labour Law* (2006) 1 at AA1-408.

¹¹⁶ J Grogan *Dismissal, Discrimination & Unfair Labour Practice* (2005) at 163.

¹¹⁷ *Ibid.*

¹¹⁸ [1997] 3 BLLR 336 (CCMA) at para 341D.

¹¹⁹ (2003) 24 ILJ 622 (CCMA) at 643E-F.

¹²⁰ *Ibid.*

is concluded that 'the employee will also have to show that the resignation was action of last resort'.¹²¹ It follows therefore that 'if the employee's concerns are not well founded or if there are other reasonable remedies, the onus is not discharged'.¹²²

6.4.3 Compensation for constructive dismissal under the Labour Relations Act 66 of 1995 ('LRA')

The victim of sexual harassment may seek relief in terms of section 193 of the LRA for reinstatement, re-employment in the same job or alternative job reasonably suitable to the plaintiff, or compensation. The remedy of reinstatement is not a viable option because it is prejudicial to the victim in that she would have left her job in the first place because the continued employment was intolerable. Furthermore, reinstatement is also not a practical option where:

- the plaintiff has to bear the brunt of yet facing her harasser on a perpetual basis; and
- the relationship between the plaintiff and the perpetrator is strained beyond repair.

An efficient remedy for constructive dismissal as an unfair dismissal is in terms of section 194(1) of the LRA, which caps compensation and 'may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal'. Compensation is capped at no more than 24 months remuneration for an automatically unfair

¹²¹ AC Basson, MA Christianson, C Garbers, PAK le Roux, C Mischke and EML Strydom *Essential Labour Law* 4ed (2005) at 93.

¹²² D Du Toit, D Bosch, D Woolfrey, S Godfrey, C Cooper, GS Giles, C Bosch and J Rossouw *Labour Relations Law: A Comprehensive Guide* 5ed (2006) at 387. See also *Kuipers and Duratract Plastics (Pty) Ltd* (2004) 25 ILJ 758 (BCA) at 767I where Albertyn A held that the employee had reasonable alternatives other than resigning as she resigned while her grievance hearing and performance management counselling were in progress.

dismissal.¹²³ It is submitted that in the case of constructive dismissal as a result of sexual harassment, something more than just monetary loss is involved. Sexual harassment often involves *iniuria*, which can clearly not be recovered under the LRA but can be claimed under the EEA.

It is worth noting that section 46(9)(c) of the now repealed LRA¹²⁴ ("the old LRA") read wider than the current LRA¹²⁵ in that it empowered the court to make an order 'including but not limited to' compensation. An award for compensation was also not capped in the old LRA as is the case in the current LRA. In *Harmony Furnishers v Prinsloo*¹²⁶ the Labour Appeal Court awarded compensation for *iniuria* and interpreted section 46(9)(c) of the old LRA to be wide enough to include compensation for intangible loss and held as follows:

It is clear on the facts put before the Industrial Court that the conduct of the appellant in conducting an extremely lengthy interrogation, in searching the respondent's home and motor car, and in causing him to be arrested and detained by the police for an entire night, not only constitutes an unfair labour practice since all of this occurred while respondent was employed by appellant, but also was a clear *injuria*.¹²⁷

Similarly, the Industrial Court in *Sibiya v Num*¹²⁸ read section 46(9)(c) of the old LRA to include non-monetary damages and gave an award:

in the form of a solatium for the infringement of the employee's personality rights in the form of an injury to his dignity resulting from the employer's failure to afford him an opportunity to be heard.

The Industrial Court went to acknowledge the distinction between section 46(9)(c) of the now repealed LRA and section 194(1) of the LRA and held that 'it would be inappropriate to attempt to apply a similar formulae when assessing compensation' in terms of 'section 46(9) of Act 28 of 1956, as is applied by section 194(1) of the new Act'.¹²⁹ This means that the plaintiff can also ground her action in terms of the EEA and seek payment for intangible loss flowing from *iniuria*, which is otherwise not recoverable in terms of the

¹²³ Ss 187(1)(f) and 194(3) LRA.

¹²⁴ 28 of 1956.

¹²⁵ 66 of 1995.

¹²⁶ *Supra* (n73).

¹²⁷ *Supra* (n73) at 1473-4.

¹²⁸ *Supra* (n76) at 804.

¹²⁹ *Supra* (n76) at 804-5.

LRA; and for payment of compensation,¹³⁰ which is not capped in the EEA as in the LRA. It is highlighted that section 194 of the LRA is not restricted to compensation for patrimonial loss but is merely 'one of the factors that need to be taken into account by the court when determining compensation,'¹³¹ which is just and equitable in the circumstances. This means that in deciding the maximum compensation payable in terms of section 194(3) of the LRA, the court will also take into account, in addition to patrimonial loss suffered, 'the calculating manner'¹³² in which dismissal was effected; and the employer's 'attitude'¹³³ and conduct in dealing with sexual harassment. It is argued that the labour law remedies are not mutually exclusive and the plaintiff is at liberty to claim of constructive dismissal under the LRA, and claim damages and compensation for unfair discrimination under the EEA.

In all likelihood, the victim of sexual harassment will be able to receive compensation once she has proved constructive dismissal. Since constructive dismissal involves loss of employment, it signifies loss of income and thus the purpose of the compensation is to fill a hole in the victim's earnings.

6.4.4 Conclusion

This chapter has established that section 60(3) of the EEA is a distinctive type of vicarious liability, which is neither a true reflection of *common-law* liability nor equivalent to *common-law* vicarious liability. The advantage with the EEA is that the burden is lighter for the plaintiff when pleading unfair

¹³⁰ S 50(2) of the EEA enjoins the court to make any appropriate order, which is just and equitable in the circumstances thereby enabling the court to take into account any aggravating factors, which might have a bearing on the granting of the award.

¹³¹ G Giles and D Du Toit 'Compensation for Unfair Dismissal: How Will the New Section 194 Work?' (2002) 6 *Law, Democracy and Development* 124 at 138.

¹³² *Christian v Colliers* supra (n29).

¹³³ *Ntsabo* supra (n12).

discrimination, because sexual harassment is outlawed as a form of unfair discrimination, which is prohibited on grounds of gender.¹³⁴

It is concluded that the 2005 Code is consistent with the European Union Directive that states that sexual harassment 'shall be deemed to be discrimination on the grounds of sex and therefore prohibited'.¹³⁵ The 2005 Code has also added a human rights criterion in the definition of sexual harassment by stating that it violates the rights of an employee and the impact of the conduct should constitute an impairment of dignity.¹³⁶ The European Union Directive also endorses the human rights approach by defining sexual harassment as:

where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.¹³⁷

It is emphasized that the violation of rights will be a factor taken by the courts when determining the payment of damages¹³⁸ in terms of section 50(2)(b) of the EEA thereby alleviating the need for the plaintiff to prove that her rights have been violated as a result of sexual harassment. The 2005 Code thus links protection for the victim of sexual harassment to the rights entrenched in the Constitution thereby making the promise and protection of the constitutional rights a reality in the workplace. The rights violated in the context of sexual harassment are the right to equality;¹³⁹ right to dignity;¹⁴⁰ right to freedom and security of the person;¹⁴¹ right to bodily and psychological integrity;¹⁴² right not to be unfairly discriminated against based

¹³⁴ S 6(1) EEA.

¹³⁵ Article 2 Directive 2002/73/EC of the European Parliament and of the Council (2002) amending Council Directive 76/207/EEC 'Implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions'.

¹³⁶ Items 4 and 5.4 2005 Code.

¹³⁷ Article 2 above (n121).

¹³⁸ S 50(2)(b) EEA.

¹³⁹ S 9 Constitution.

¹⁴⁰ S 10 Constitution.

¹⁴¹ S 12 Constitution.

¹⁴² *Ibid.*

on sex, gender and/or sexual orientation;¹⁴³ and right to choose trade, occupation or profession freely.¹⁴⁴

It is worth noting that the recourse in terms of section 60 of the EEA is limited to sexual harassment in the workplace. Section 60 of the EEA is a preferred remedy compared to delictual liability because fault is based on negligence rather than on intention, and the *common-law* vicarious liability 'scope of employment' is not part of the test for *statutory* vicarious liability. This makes the burden on the plaintiff lighter. Damages under the *actio iniuriarum* would cover a wider field, which includes sentimental loss and is not limited to 12 month's remuneration. Furthermore, circumstances surrounding unfair discrimination and constructive dismissal such as supervisory abuse of power/authority could form part of unlawfulness inquiry in a delictual action. Similarly, the scope of compensation under the EEA is not narrower than in delict in that the EEA, unlike the LRA, does not cap compensation and is 'not exhaustive'¹⁴⁵ but is discretionary to the court.¹⁴⁶

It has been highlighted that the plaintiff can claim compensation for any tangible and intangible losses (like *contumelia* and sentimental loss) suffered as a result of sexual harassment under section 50(2)(b) of the EEA without a need to pursue a delictual remedy of the *actio iniuriarum* to claim non-monetary damages. The effect of the award will thus be to deter any future transgression of the anti-discrimination practices in the workplace and to restore workplace equity. In giving such an award, the court must give cognisance 'to the qualities and purposes which underlie the anti-discriminatory measures in the EEA'.¹⁴⁷ The EEA is therefore efficient in that

¹⁴³ S 9(3)-(4) Constitution.

¹⁴⁴ S 22 Constitution.

¹⁴⁵ *Ntsabo supra* (n12) at 98.

¹⁴⁶ S 50 EEA.

¹⁴⁷ *Christian v Colliers supra* (n29) at 484A.

'it can give people back the humanity that the violation took away' and 'gives law the power to change'.¹⁴⁸

The advantage with a delictual remedy of the *actio iniuriarum* is that it applies beyond the workplace and is not dependent on a finding of an employer-employee relationship. This means that in *K v Minister of Safety and Security*¹⁴⁹ the *actio iniuriarum* would have been available to NK as opposed to the EEA remedy, to vindicate impairment of dignity where rape was found to have occurred in the perpetrator's course of employment but in the absence of an employer-employee relationship between NK and the employer.

For *common-law* delictual liability, simply an impairment of dignity is required which would seem to include unfair discrimination but ranges more broadly as well. However, section 60 of the EEA is still an important and powerful remedy for victims of sexual harassment in that it contains a form of deemed personal liability (and *statutory* vicarious liability). This is strengthened by the adoption of the 2005 Code under the EEA, which imposes duties on the employer to take active steps in combating sexual harassment in the workplace. Section 60 of the EEA is preferred to *common-law* vicarious liability because of the stringent rules of agency, which were apparently interpreted by the courts to exclude sexual harassment within the scope of employment. However, *NK (CC)*¹⁵⁰ has established that rape is within the course of employment and has opened up some possibilities for *common-law* vicarious liability in the context of sexual harassment.

It is concluded that whether or not the employer took reasonable steps in terms of the affirmative defence in section 60(4) of the EEA, is a factual enquiry, which centres on what was an appropriate and reasonable response

¹⁴⁸ MacKinnon *op cit* (n22) 108.

¹⁴⁹ [2005] 8 BLLR 749 (CC).

¹⁵⁰ *Ibid.*

in the circumstances.¹⁵¹ An employer is merely expected to discharge its statutory obligations in terms of the EEA by taking reasonable steps and 'by ensuring an organisational culture and management style that fosters openness, trust, and support'.¹⁵² The affirmative defence also does not apply to *common-law* vicarious liability. The fact that the employer had proper policies in place might however, be relevant to employer's lack of knowledge of unlawfulness of its or its employee's conduct.

The disadvantage with the constructive dismissal is that 'from a policy standpoint, however, it is suggested that to require a woman to resign in order to acquire an effective remedy against harassment may be regarded as unduly onerous'.¹⁵³ It is emphasized that in the light of a common fact that female unemployment rate¹⁵⁴ is higher at 36% for black African females and at 5.8% for white females than male unemployment rate at 27.5% for black African males and at 5.1% for white males in South Africa, constructive dismissal is not a viable remedy.

Mowatt also opines that the shortcoming in the use of a constructive dismissal remedy is that 'it requires the female employee to be dismissed or to have her employment terminated for her to acquire an effective remedy against sexual harassment'.¹⁵⁵ Mowatt correctly asserts further that a delictual remedy is a better alternative, which does not suffer this shortcoming and 'is wider than the contractual action'.¹⁵⁶ The fight against sexual harassment will not be won if women are driven out of the workplace through constructive dismissal. The aim is to transform the workplace to uphold and reflect the values of dignity, equality, and *ubuntu* for all.

¹⁵¹ See *Croft v Royal Mail Group plc* [2003] ICR 1425 (CA), where the court held that steps which require time, trouble and expense, and which may be counterproductive given an agreed low-key approach and are disproportionate to the result, may not be reasonable steps if, on an assessment, they are likely to achieve little or nothing.

¹⁵² T Stephens and J Hallas *Bullying and Sexual Harassment: A practical handbook* (2006) at 5.

¹⁵³ Rubenstein *op cit* (n88) 8.

¹⁵⁴ Statistics South Africa 'Statistics release P0210 - Labour Force Survey' (September 2004).

¹⁵⁵ JG Mowatt 'Sexual Harassment - Old Remedies for a New Wrong' (1987) 104 SALJ 439 at 450.

¹⁵⁶ *Ibid.*

Chapter Seven – The Remedy of *Common-Law* Vicarious Liability

7.1 Outline

Considerable strides have been made in the courts of some countries, notably Canada and South Africa, beyond the formal equality approach of sameness with a dominant (male) standard and towards substantive equality, measuring laws and policies against realities of subordination and gender hierarchy.¹

This chapter examines the use of vicarious liability as a remedy to find the employer liable and be made to pay for the wrongful act committed by its employee. The principle of vicarious liability in the context of the employer-employee relationship is thus an 'exception' to a general rule that 'a person is not liable for the unlawful actions of others'.² In *Gifford v The Table Bay Dock and Breakwater Management Commission*, De Villiers CJ stated the principle of vicarious liability as enunciated by Story and Pothier, which he quoted:

The principal is liable to third persons for the torts, negligences, and other malfeasances or misfeasances and omissions of his servant or agent in the course of his employment, although the principal did not authorize or justify or participate in, or indeed know of such misconduct, or even if he forbade the acts or disapproved of them. "In all such cases," he adds, "the rule applies *respondeat superior*; and it is founded upon public policy and convenience" ...³

It will be shown in the light of the above extract how courts have inconsistently applied the principle of vicarious liability in vacuum and in total disregard of its mischief and underlying policy considerations. A comparison will be made between South Africa and the *common-law* jurisdictions of Canada, United States, United Kingdom on how the authorities have narrowly and rigidly applied the principle of vicarious liability to deny protection for victims of sexual harassment by regarding it as

¹ CA MacKinnon *Are Women Human?: And Other International Dialogues* (2006) at 7.

² JPA Swanepoel *Introduction to Labour Law* 3ed (1993) at 25.

³ *Gifford v The Table Bay Dock and Breakwater Management Commission* (1874) 4 Buch 96 (Supreme Court of the Cape of Good Hope) at 114 citing *Story on Agency* §§ 308, 452-456 and *Pothier on Obligations* n.n. 121 and 453.

'a frolic of one's own', 'personal' and 'not within the job description to sexually harass'. These *common-law* jurisdictions are comparable to the South African jurisdiction because they were a catalyst in the development of sexual harassment law in South Africa. A comparative study is thus important to ensure full protection of the human rights entrenched in the Constitution. Therefore, the use of a comparative method as prescribed in terms of section 39 of the Constitution is instrumental to the South African courts in learning how other foreign jurisdictions have addressed the common problem of sexual harassment in the workplace in a way that effectively promotes gender equality and respect for dignity/*ubuntu* of workers.

This chapter will highlight that the basis for vicarious liability is based on public policy, convenience, and agency principles. Similarities will be extracted on how South Africa has developed law on sexual harassment in compliance with the Constitutional mandate to be in line with the *common-law* jurisdictions.⁴ It will be examined how South Africa, Canada, United States, and United Kingdom have heeded to the rationale for invoking vicarious liability as an alternative remedy, in developing law on sexual harassment, which is:

- a) 'to make sure that institutional power is not abused to discriminate on the basis of sex';⁵
- b) to furnish 'an innocent tort victim with recourse against a financially responsible defendant';⁶
- c) 'the desirability of affording claimants efficacious remedies for harm suffered';⁷ and
- d) 'to incite employers to take active steps to prevent their employees from harming members of the broader community'.⁸

⁴ Ss 39(2) and 173 Constitution.

⁵ CA MacKinnon *Women's Lives, Men's Laws* (2005) at 182.

⁶ *Bazley v Curry* [1999] 2 SCR 534 at para 26.

⁷ *K v Minister of Safety and Security* (2005) 8 BLLR 749 (CC) at para 21.

The basis for vicarious liability is to spread the loss and offer compensation to the plaintiff since employers have deeper pockets than the perpetrator (employee) who is often a man of straw. This chapter will examine how the courts in South Africa developed the *common-law* remedy of vicarious liability to be in harmony with the Canadian and English authorities in order to cope with sexual harassment in the workplace. It will be shown that the developments in Canada, United Kingdom and the United States were instrumental and persuasive on the *common-law* evolution of sexual harassment law in South Africa. This was done by broadening the 'scope of employment' test to include approaches compatible with an abuse of power and trust; 'frolic of one's own'; enterprise risk; mismanagement of duties; and abuse of supervisory authority.

Vicarious liability thus involves spreading the risk to the employer who runs an enterprise, which has inherent risks of sexual harassment and thus carries an instructive objective of encouraging the employers to be pro-active and prevent sexual harassment.

7.2 General principles of vicarious liability in South Africa

In South Africa, the enquiry in order to establish vicarious liability on the part of the employer for sexual harassment by its employees is a two-leg test:

- (i) Who is an employee? and
- (ii) What is meant by the course and scope of employment?

One of the essentials for finding the employer vicariously liable is the existence of an employer – employee relationship. In this respect, it is paramount to distinguish between the employee and the independent contractor. A servant is an employee who works under the control and

⁸ *Ibid.*

direction of his employer. An independent contractor is the person engaged to do certain work, but exercises his own discretion as to the mode and time of doing it. One of the factors to be taken into account in assessing whether there is an employer-employee relationship is a test of right of control and supervision over the employee.

7.2.1 Who is an employee?

In South African law, a leading case, which is authority on the right of control and supervision test, is *Colonial Mutual Life Assurance Society v Macdonald*.⁹ The court stressed that the master - servant relationship cannot exist where there is a total absence of the right of supervising and controlling the worker under the contract. The court went on to add that a master must have a right to prescribe to the worker not only what has to be done, but also the manner in which that work has to be done. It is emphasized that the court will thus look at the totality of factors that bear upon the existence of the contract of employment which include the power to hire and fire, remuneration arrangements, the nature of work and *modus operandi* thereof, the degree and extent of discretion and the freedom of action accorded to the servant.

Joubert JA modified the traditional test of right of control and supervision advanced in the case of *Colonial Mutual Life Assurance Society*,¹⁰ in the case of *Smit v Workmen's Compensation Commissioner* where he developed the 'dominant impression' test as follows:

It is in the marginal cases where the so-called dominant impression test merits consideration...the presence of a right of supervision and control...is not the sole determinative factor since regard must also be had to other important indicia in the light of the provisions of the particular contract as a whole.¹¹

⁹ 1931 AD 412 at 435.

¹⁰ *Ibid.*

¹¹ 1979 (1) SA 51 (A) at 62D-3B.

In the light of the above extract, it is underscored that the existence of the right of supervision and control is one of the many factors, which indicate an existence of an employment contract. The right of control test is therefore no longer a conclusive test in establishing a contract of employment and 'if this had been insisted upon in an age of increasing professionalism and technical skill, the result would have been greatly to diminish the scope of vicarious liability'.¹²

In *Stein v Rising Tide Productions CC*¹³ the court reiterated the principle developed in *Smit v Workmen's Compensation Commissioner*¹⁴ that the correct test to be applied in determining an existence of an employment contract is not the 'control' test but the 'dominant impression' test. The court went on to list a 'number of *indiciae*, the combination of which may be decisive'¹⁵ in assessing 'whether or not the dominant impression of the relationship is that of a contract of employment'.¹⁶ This view is consistent with English law where the 'control test' is no longer the conclusive test but 'the practice of the courts is to examine a variety of indicia and to consider the totality of the relationship between the parties'.¹⁷ Ultimately, the question of whether or not a person is an employee or an independent contractor, hinges upon the dominant impression created on the facts.

The court endorsed *Langley v Fox Building Partnership (Pty) Ltd v De Valence*¹⁸ and held that there is no vicarious liability for the negligence or wrongdoing of an independent contractor 'except in situations where the employer has been personally at fault'.¹⁹ This means that the employer is liable where either 'the employer failed to take reasonable care in selecting or

¹² RA Buckley *The Law of Negligence* 4ed (2005) at 386.

¹³ [2002] 2 All SA 22 (C).

¹⁴ *Supra* (n11).

¹⁵ *Supra* (n13) at 28.

¹⁶ *Supra* (n13) at 27.

¹⁷ RP Balkin and JLR Davis *Law of Torts* 3ed (2004) at 783.

¹⁸ 1991 (1) SA 1 (A).

¹⁹ *Supra* (n18) at 28.

instructing the independent contractor; or the employer is under a “personal” or “non-delegable” duty’.²⁰

NEDLAC has issued a ‘Code of Good Practice’²¹ published in terms of section 200A(4), read with section 203, of the LRA which sets out guidelines on who is an ‘employee’ and clarifies the interpretation of the presumption as to who the employee is in terms of section 200A of the LRA. Section 200A creates presumption on who is the employee and reads as follows:

- 1) Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:
 - a) the manner in which the person works is subject to the control or direction of another person;
 - b) the person's hours of work are subject to the control or direction of another person;
 - c) in the case of a person who works for an organisation, the person forms part of that organisation;
 - d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
 - e) the person is economically dependent on the other person for whom he or she works or renders services;
 - f) the person is provided with tools of trade or work equipment by the other person; or
 - g) the person only works for or renders services to one person.

The paramount importance of distinguishing between an ‘employee’ and an ‘independent contractor’ has become less evident in an epoch of increasingly ‘atypical’ employment. Employment is not what it used to be with the advent of ‘casualization, externalization and informalization’,²² and also in the context of the constitutional right to fair labour practices which is available to ‘everyone’.²³

O'Regan J in *South African National Defence Union v Minister of Defence and Another*²⁴ held that in the light of section 39 of the Constitution which mandates that the courts ‘must consider international law’ when interpreting the Bill of Rights. Furthermore, the court held that the meaning and scope of

²⁰ Balkin and Davis *op cit* (n17) 795.

²¹ GG Notice 1774 of 2006.

²² J Theron ‘Employment Is Not What It Used To Be’ (2003) 24 *ILJ* 1247 at 1256-7.

²³ S 23(1) Constitution.

²⁴ 1999 (6) BCLR 615 (CC) at para 25.

the term 'worker' must be construed having regard to the conventions and recommendations of the International Labour Organisation ('ILO'). The Constitutional Court further held that the meaning of the 'worker' must be given a 'generous interpretation' and not be restricted primarily to those who have entered into a contract of employment to provide services for an employer.²⁵ Article 5 of the ILO Employment Relationship Recommendation²⁶ which has been 'adopted'²⁷ in the sense of integration into the labour legislation and attached as an annexure in the Nedlac Code on 'who is the employee', states that:

Members should take particular account in national policy to ensure effective protection to workers especially affected by the uncertainty as to the existence of an employment relation, including women workers, as well as the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities.

It would seem that a more generous, inclusive and less formal concept of who deserves legislative protection, is appropriate also in the context of remedies for sexual harassment, in the light of the following:

- a) The changing nature of employment;
- b) South Africa's international obligations in terms of the ILO conventions and recommendations; and
- c) The mandate of the courts in terms of section 39(2) of the Constitution to develop *common-law* and interpret legislation to accord full protection of the constitutionally entrenched rights.

The most difficult part, which usually serves to negate a finding of vicarious liability, is the test of course and scope of employment. If it is proved that the person was not the employer's employee at the time of the commission of delict, then the enquiry ends there and there is no need to enquire whether the delict was committed within the scope of employment.

²⁵ *South African National Defence Union* supra (n24) at paras 27-8.

²⁶ Adopted 15 June 2006.

²⁷ The attachment of the ILO Employment Relationship Recommendation, 2006, to the Nedlac Code of Practice on who is an employee may be an indication of acceptance of principles as they are reflected in the Code.

In the thesis, the use of the term 'employer' refers to any natural person or juristic person, whether an institution, corporation or governmental entity 'who receives services from an employee or is assisted in the conduct of its business by an employee'.²⁸

7.2.2 What is meant by the course and scope of employment?

Once it has been proved that the perpetrator was the employee at the time of committing sexual harassment, it must be proved further that the employee, at the time of commission of sexual harassment was acting within the 'scope of employment' to ground vicarious liability on the part of the employer. The employee is considered to act 'within the scope of his employment if he acts in the execution or fulfilment of his duties in terms of the employment contract'.²⁹ It follows therefore that an agent who acts beyond of scope of his employment becomes a stranger to his master and is on a frolic of his own.

Judicial precedents will be examined on how the courts have battled to interpret the 'scope of employment' to include intentional wrongdoing. It is stressed that the strict interpretation of the 'scope of employment' is problematic in the context of sexual harassment in the workplace since sexual harassment is a workplace event albeit a frolic of one's own and often involves the mismanagement of duties.

In *Mkize v Martens*³⁰ the employer engaged two youths to assist him in his transportation business and undertook to supply them with food on their journeys. The employer was held liable for the damage caused by a fire, which the boys had lit while on their journey for cooking their midday meal and had negligently allowed to spread. The act of making a fire, was held to

²⁸ D Du Toit, D Bosch, D Woolfrey, S Godfrey, C Cooper, GS Giles, C Bosch and J Rossouw *Labour Relations Law: A Comprehensive Guide* 5ed (2006) at 80.

²⁹ J Neethling, JM Potgieter and PJ Visser *Law of Delict* 5ed (2006) at 341.

³⁰ 1914 AD 382.

be a reasonable essential for executing the employer's instructions and therefore within the course of employment. It was thus established that the employer is vicariously liable for wrongful acts committed by its agents whilst acting in furtherance of the employer's aims.

An employer will not be vicariously liable for the wrongful act committed by an employee in doing something, which he is permitted to do, but which does not constitute a discharge of his duties to the employer at the time and place when the wrongful act occurred.³¹ This principle is problematic in the context of sexual harassment because it does not serve the master and is clearly a deviation from the authorised yet the deviation can provide a sufficiently close link to ground vicarious liability on the part of the employer.³²

It is worth comparing *Mkize v Martens*³³ with an English case of *Crook v Derbyshire Stone Ltd*.³⁴ In the latter case, the first defendants, his employers, permitted the second defendant, a lorry driver, to stop during journeys to obtain refreshments. One morning, having parked his lorry on the side of the road, he proceeded to walk across the road to a café. While crossing the road he collided with the plaintiff, who was riding a motorcycle. The collision was due partly to the negligence of the plaintiff.

Pilcher J held that at the time when the accident occurred, the second defendant was a 'stranger to his master'. He further reasoned that the employer was not liable to the plaintiff for the consequences of the second defendant's negligence because although the second defendant was employed at the time of the accident and was permitted to obtain refreshments, the obtaining of the refreshments was not something that he was employed to do.

³¹ *Crook v Derbyshire Stone Ltd* [1956] 2 All ER 447.

³² See NK (CC) *supra* (n7).

³³ *Supra* (n30).

³⁴ *Supra* (n31).

Therefore, he was not discharging his duty to his employer when the accident occurred.

Pilcher J went on to confirm the controversy surrounding the application of the scope of employment test and considered two scenarios on the same facts, which might lead the court to reach a different conclusion:

It is interesting to inquire (and the question might be difficult to resolve) what the position would be if a lorry driver in the second defendant's position crossed the road to ask the way or to get a tin of petrol to put into his lorry; or indeed, what the position might have been if, returning from the café, the second defendant had seen someone getting into his lorry and about to drive it off, had hurried across the road to stop him, and had been involved in a collision. Those are all matters which may fall on one side of the line or the other.³⁵

An authorised meal break is incidental to employment yet it was considered to be outside the scope of employment in *Crook v Derbyshire Stone Ltd.*³⁶ This highlights that there is no hard and fast rule as to what constitutes 'scope of employment'. What the South African court in *Mkize v Martens*³⁷ found to be within the scope of employment whilst carrying out instructions of the employer, was found to be a digression from the scope of employment by the English Court in *Crook v Derbyshire Stone Ltd.*³⁸ It is suggested that the problem with the application of the vicarious liability is that courts are neither always consistent nor certain at what point a chain of employment can be considered to be broken in order to regard the wrongful act committed by the employee as being beyond the scope of employment.

The liability of the employer is not confined to acts done by the employee within the employer's authority. The employer's liability extends to all acts falling within the general scope of employment, which do not deprive the employer of the power to order the employee to act within or beyond that scope of authority.³⁹ In *Estate van der Byl v Swanepoel*,⁴⁰ a taxi driver was authorised to drive through a certain area but was expressly forbidden to ply

³⁵ *Supra* (n31) at 450F-H.

³⁶ *Ibid.*

³⁷ *Supra* (n30).

³⁸ *Supra* (n31).

³⁹ *Estate van der Byl v Swanepoel* 1927 AD 143.

⁴⁰ *Ibid.*

for hire within the same area. He disobeyed his orders and, while carrying a passenger, ran into the plaintiff and injured him. The master was correctly held liable for the servant's delict because by the terms of the contract the master had the right to order the servant to drive within the stated area where the accident occurred and to control him while driving there.

Burchell correctly states that the employer is liable if its agent 'acts contrary to his instructions' but in so doing, still acts within the sphere of employment in 'carrying out that assignment and none other'.⁴¹ This principle was applied in *Francis Freres and Mason (Pty) Ltd v Public Utility Transport Corporation Ltd*⁴² where the court found the employer vicariously liable for the negligent collision with plaintiff's two stationary vehicles by a mechanic (L).

Although L acted contrary to the master's instructions in delegating the driving of the bus to Walter, he did so in the course and scope of his employment. It was his function to see to it that the bus reached the workshop and he adopted an improper method or mode of doing what he was authorised to do. That is, the delict was committed within the scope of his job description and was thus not far removed from the servant's execution of his duties. Compare this case with *Roos v De Loor's Ltd*⁴³ where a person employed as a confectioner took his master's car, without its knowledge and consent, for delivering confectionery. On his route, he collided with a motorcycle and the driver of the motorcycle died because of the accident.

The court held that the employer was not vicariously liable for the negligent collision caused by its agent. The court noted that a master is liable for the wrongs of its servant committed in the exercise of the tasks to which he is appointed. Vicarious liability can thus not be extended to cases where a servant is appointed to perform tasks of an entirely different class also requiring special qualifications.

⁴¹ J Burchell *Principles of Delict* (1993) at 218-9.

⁴² 1964 (3) SA 23 (D).

⁴³ 1931 TPD 100.

In *Viljoen v Smith*⁴⁴ the court held that whether or not an employee had abandoned his employment or he had not acted in the course and scope of employment during his excursion, was a factual enquiry and one of the factors to be taken into account was a degree of digression. The court further highlighted that not every act of an employee committed during time of employment in advancement of personal interests or achievement of own goals, necessarily falls outside the course and scope of his employment.

It is submitted that it is not sufficient that the work affords the employee a mere opportunity to commit a wrongful conduct. It is suggested that for vicarious liability to ensue, there must be an abuse or misuse by the servant of the authority vested in him and the act must be so connected to the employer's work that it may be regarded as a *modus operandi*, albeit an improper one of doing work. In *Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd*⁴⁵ the goods belonging to the plaintiff, an exhibitor at a house and garden show, were stolen by guards supplied by the defendant to protect the property of the exhibitors against theft.

Booyesen J held that there were two grounds for holding the employer vicariously liable:

Firstly, the breach by defendant's employees of its non-delegable duty to guard the premises and the goods therein; and, secondly, the abandonment of the defendant's work by said employees, which amounted not only to misconduct for their own benefit, but constituted mismanagement in the performance of their work, and was in itself the cause of harm to the plaintiff.⁴⁶

It is emphasized that this reasoning is relevant to sexual harassment in the workplace. The fact that the court found the employer vicariously liable for the employee's mismanagement of his duties means that the duties have both a positive and negative aspect. The positive aspect is the proper execution of duties for which the employee is employed. The negative aspect of the employee duties is to refrain from negligently executing his duties in a way

⁴⁴ 1997 (1) SA 309 (A).

⁴⁵ 1992 (3) SA 643 (D).

⁴⁶ *Supra* (n45) at 644.

that deviates from his job description and poses a danger to other employees. It is highlighted that the employer will thus be liable for sexual harassment where it occurred whilst the perpetrator was simultaneously acting in the scope of employment and engaged in the business activities of the master. The omission to perform the duties may amount to the breach of duty that the employee owes to the victim of sexual harassment.

It is underscored that the harasser has not abandoned his employment when he mismanages his duties but is still in the scope of employment in that at the time and place of sexual harassment, he is serving the master. In the context of sexual harassment, the mismanagement of duties is relevant and closely intertwined to the scope of employment in that a supervisor may abuse his power or authority by taking advantage of his seniority and organizational power. The supervisor carries enormous institutional responsibilities, which entail staff management, staff recruitment and retention, performance appraisal, implementing salary and bonus-pay increments, and granting promotions.

Similarly, a caretaker may abuse his duties to care and protect the vulnerable people subordinate to him. A caretaker is trusted by those in his care and may exploit that trust by mismanaging his duties. It is submitted that the organizational power creates an opportunity for the supervisor/caretaker to misuse his powers to further his own personal ends whilst simultaneously executing his functions. There is an overlap between execution of duties and mismanagement of those duties in that mismanagement involves an omission or failure to carry out duties. Mismanagement of authorised tasks does not make sexual harassment an independent act, which is a mere frolic of one's own.

In *Feldman v Mall*⁴⁷ the driver of a vehicle had to deliver goods and thereafter immediately return to the business of the employer. Instead, the

⁴⁷ 1945 AD 733.

driver deviated from the route and drove to a township where he spent several hours on his own affairs and consumed enough alcohol to make him incapable of driving the van with safety. On his return trip, he negligently ran over a person and caused his death. Tindall JA held that the test to be applied is whether the servant's digression was so great in respect of space and time that it could not be reasonably held that he was still exercising the functions to which he was appointed.⁴⁸ If this was the case, the master is not liable. The court concluded that in each particular case a matter of degree would determine 'whether the servant can be said to have ceased to exercise the functions to which he was appointed'.⁴⁹ The court thus held that the employer was vicariously liable because the employee at that stage had resumed his duties.

It is submitted that even if the accident had occurred when the driver was on his way to the township, the employer would have been still liable since the chain of causation would not have been severed. At that time, the driver would not have acted beyond the scope of control, and thus beyond the scope of employment. An observation is made that in any event, the causing of an accident was a mismanagement of his duties since being a motor-van driver included driving the vehicle cautiously as not to cause injury to third parties. Watermeyer CJ rightly concluded that 'his departure from the path of duty did not take him so completely away from the functions entrusted to him as a servant as to exonerate his master from legal responsibility for his negligence'.⁵⁰

One of the considerations that the courts take into account in deciding whether an act was performed in the course of employment is a two-leg test comprising of subjective and objective element. The subjective element enquires into the state of mind of the employee at the time of the commission of the offence as to whether he was executing instructions of the employer

⁴⁸ Supra (n47) at 756.

⁴⁹ Supra (n47) at 756-7.

⁵⁰ Supra (n47) at 743.

and had not abandoned his employment. The objective element enquires whether on the facts there is a sufficiently close link between the servant's acts for his own personal interests and the business of the employer. This principle was established in *Minister Police v Rabie*:

It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention ...The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.⁵¹

The above paragraph was approved in *NK (CC)*⁵² where the Constitutional Court held that the approach to vicarious liability raises a subjective and objective enquiry. The subjective element enquires into the state of mind of the employee and asks whether the wrongful act was an independent act done solely for the purposes of the employee. The Constitutional Court held that the objective element is a mixed question of fact and law, which enquires into whether there is a sufficiently close nexus between the wrongful act and the business of employer.

The court is under a constitutional mandate to give effect to the 'spirit, purport and objects of the Bill of Rights' when answering whether there is a sufficiently close nexus between the wrongful conduct and the business of the master.⁵³ It is argued that giving effect to the 'spirit, purport and objects of the Bill of Rights' means that the courts, when interpreting any legislation or developing *common-law*, must endeavour to vindicate the constitutional rights of the plaintiff and deliver the promise of protection of rights entrenched in the Constitution. This means that the application of the test of vicarious

⁵¹ 1986(1) SA 117 (A) at 134C-E.

⁵² *Supra* (n7) at para 32.

⁵³ *Ibid.* In *NK (CC)* *supra* (n7) at para 17, O'Regan J held that the overall purpose of section 39(2) is:

[T]o ensure that our *common-law* is infused with the values of the Constitution. The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the *common-law* is in issue, but in all cases where the incremental development of the rule is in issue.

liability 'should not offend the Bill of Rights or be at odds with our constitutional order'.⁵⁴

It is emphasized that the objective element thus serves to bring intentional wrongdoing within the ambit of vicarious liability where the act was subjectively done solely for self-gratification not with intent to serve the master. In addition, where on examining the facts and law, there is a close nexus between the employee's independent act and the business of the master; it is immaterial that the employee subjectively intended to advance his own personal ends.

In *Bezuidenhout NO v Eskom*⁵⁵ the court established that whether or not conduct is within the scope of employment is a question of fact and degree. The court also explored the subjective and objective enquiry enunciated in *Rabie*,⁵⁶ which looks at the subjective state of mind of the employee, and the objective test of a sufficiently close link between the servant's acts and the business of the master. The court held that the 'close connection' was demonstrably absent because Oelofse did not intend to further Eskom's affairs. The court concluded that the conduct of the driver fell beyond the scope of his employment because subjectively the driver knew that he was prohibited from giving lifts to the public.

The finding in *Bezuidenhout NO v Eskom*⁵⁷ shows that it may be arduous for victims of sexual harassment who seek to rely on the principle of vicarious liability. This is so because subjectively, the employee is furthering his own sexual self-gratification or assertion of power when he sexually harasses and an act of sexual harassment is apparently not part of his job description or modus operandi of his employment. It is suggested that this is a strict analysis of the unauthorised mode of doing authorised work because objectively,

⁵⁴ NK (CC) supra (n7) at para 44.

⁵⁵ 2003 (3) SA 83 (SCA).

⁵⁶ Supra (n51).

⁵⁷ Supra (n55).

sexual harassment may be closely connected to the business of the master and it seems irrational to exclude vicarious liability in such an instance, based on the harasser's subjective state of mind (frolic of one's own).

Furthermore, according to *Bezuidenhout NO v Eskom*⁵⁸ it would seem that the employee must intend to further the employer's instructions. It is submitted that this finding is contrary to the approach in *NK (CC)*⁵⁹ where the state was held vicariously liable for rape committed by on-duty policemen even though they were "furthering their own ends". Similarly, in *Lister and others v Hesley Hall Limited*⁶⁰ the House of Lords held that the motive of the employee and the fact that he is doing something which serves only his own ends does not negate vicarious liability for its breach of the delegated duty. There are instances where a frolic of one's own (for example, supervisory harassment, police brutality, and parental authority abuse) may be closely connected to the employment to reasonably conclude that the wrongful conduct was within the scope of employment.

In *Ntsabo v Real Security CC*⁶¹ the court noted that the conduct of sexual harassment was not within the scope of employment in that it 'did not fall anywhere within the job description of Dlomo or that of the applicant'. An observation is made that if such a strict interpretation were to be applied to the 'scope of employment', vicarious liability will arise if the employer is involved in the business of harassing employees. This means that an employer who has a sexual harassment policy in place would be able to escape vicarious liability by showing that he expressly excluded any possibility of sexual harassment being part of its course of employment. The employer would thus argue that in prohibiting sexual harassment in its policy, sexual harassment is thus a prohibited sphere of its employment. It is thus established that the challenge for the plaintiff is to demonstrate a strong

⁵⁸ *Ibid.*

⁵⁹ *Supra* (n7).

⁶⁰ [2001] UKHL 22 at para 55.

⁶¹ [2004] 1 BLLR 58 (LC) at 97.

link between the wrongful conduct and the business operations of the employer.

7.3 The basis of the principle of vicarious liability

One theory advanced as the basis of vicarious liability is the risk inherent in the enterprise approach. In *Rabie*⁶² Jansen JA held:

By approaching the problem whether Van der Westhuizen's acts were done within the 'course of employment' from the angle of the creation of risk, the emphasis is shifted from the precise nature of the link between his acts and police work, to the dominant question whether those acts fall within the risk created by the State.

This judgment is instructive in the context of sexual harassment in considering 'risk' as part of vicarious liability. In *Rabie*⁶³ the court correctly held that the state was vicariously liable where it has created a risk of unlawful harm to others through misuse of power for own purpose, especially with regard to assault, unfounded prosecution and unlawful arrest. The court further held that his appointment, as a member of the force and clothing him with all the powers involved were conducive to the wrongs he committed. Similarly, it is argued that where the employer has delegated powers to supervisors, police officers, and caretakers, there is risk of sexual harassment through misuse of authority to the advantage of the perpetrator.

The risk theory adopted in *Rabie*⁶⁴ was rejected in *Ess Kay Electronics Pty Ltd and another v First National Bank of Southern Africa Ltd* where the court held:

What seems to require continual emphasis, therefore, is that the rule and the reason for its existence must not be confused. The risk referred to, and considerations of public policy, have to do with the reason for the rule. They are not elements of the rule and they do not inform its content. It follows that unless the requirements of the rule are met, it cannot matter that it is the employee's appointment and work circumstances that place the employee in a position to commit the wrong... The question is always: were the acts in the case under consideration in fact authorised; were they in fact performed in the course of the employee's employment?⁶⁵

⁶² Supra (n51) at 134I.

⁶³ Supra (n51) at 134I-135A.

⁶⁴ Supra (n51).

⁶⁵ [2001] 1 All SA 315 (A) at 319.

The court thus correctly cautioned that the elements for vicarious liability should not be confused with its rationale. The court correctly felt that *Rabie*⁶⁶ elevated the reason for vicarious liability, to the rule of vicarious liability. That is, the elements of risk created by the employer are not part of the test but rather the two-leg test of whether an employee committed the wrongful act and whether the acts were committed within the scope of employment still applies.

In *Minister of Law and Order v Ngobo* the court also rejected the risk theory advanced in *Rabie*⁶⁷ and Kumleben JA reasoned as follows:

...what is regarded as an underlying *reason* – perhaps the main one – for attaching vicarious liability to the employer, namely, the creation of risk (also known as ‘risk liability’), has hitherto never been regarded in our law as the consideration which determines whether such liability is proved...However, in so far as *Rabie*’s case may be said to have replaced the standard test with one based on creation of risk, I am for the reasons stated of the view that it was wrongly decided. Moreover, whatever *direct* liability may in certain circumstances attach to an employer as a result of a risk created by him, this consideration in my opinion is not a relevant one to be taken into account when the standard test is to be applied in order to decide whether the master is *vicariously* liable.⁶⁸

The Appellate Division in *Ngobo*⁶⁹ correctly rejected any attempt to replace the standard test of vicarious liability with a risk theory as advanced in *Rabie*.⁷⁰ The court saw no need to complicate the standard test in order to accommodate the ‘creation of risk’ theory. In *Eskom*⁷¹ the court felt that the risk theory seeks to find and impute fault on the part of the employer based on the fact that risk of harm was reasonably foreseeable which goes against the principle of no-fault liability upon which vicarious liability is premised. The court correctly held that the risk approach to vicarious liability blurs the distinction between personal liability of the employer and vicarious liability based on the wrongful act committed by the employee as follows:

The author suggests that the meaningful answer to the “vagueness and inconsistency” of the rules relating to the unauthorised conveyance of passengers is to place the emphasis on whether the presence of the passenger in the vehicle is reasonably foreseeable (presumably, by the employer). It follows, he suggests, that

⁶⁶ *Supra* (n51).

⁶⁷ *Ibid.*

⁶⁸ 1992 (4) SA 822 (A) at 831-3.

⁶⁹ *Ibid.*

⁷⁰ *Supra* (n51).

⁷¹ *Supra* (n55).

the nature of the employee's work (the driving of a vehicle) increases the potential for committing the delict (negligent driving) and renders the course of events, causally, reasonably foreseeable. The difficulty I have with this line of reasoning is that the delict is that of the employee not the employer. Whether the foresight of the employer is relevant must be doubted.⁷²

The Constitutional Court in *NK*⁷³ referred to *Ngobo* and *Eskom*⁷⁴ cases where the court held that the *common-law* principles of vicarious liability are not to be confused with the reasons for them. O'Regan J went on to restate policy reasons which underlie the principle of vicarious liability and held that it is incorrect in the light of the section 39(2) of the Constitution to characterise it as a factual enquiry untrammelled by any considerations of law or normative principles.⁷⁵

The enterprise risk theory was adopted in *Rabie*⁷⁶ and *Bazley v Curry*⁷⁷ in an effort to impute vicarious liability to the employer - the court in *Rabie* went beyond merely citing risk as a rationale for vicarious liability but stated risk as the test in establishing the scope of employment. In *Bazley*⁷⁸ McLachlin J endorsed the 'enterprise risk' approach as a basis for upholding vicarious liability on the part of the employer and explained that the employer places an enterprise in the community, which has inherent risks in its operations and on grounds of fairness, the employer must bear the loss.

7.4 Vicarious liability in the United States

In the United States, two forms of sexual harassment are recognized: *quid pro quo* and hostile environment harassment. The historical development of the law on sexual harassment in the United States will be discussed to highlight how the courts rejected the traditional approach of vicarious liability based on

⁷² *Supra* (n55) at 92.

⁷³ *Supra* (n7).

⁷⁴ *Ngobo supra* (n68) and *Eskom supra* (n55).

⁷⁵ *Supra* (n7) at para 22.

⁷⁶ *Supra* (n51).

⁷⁷ *Supra* (n6).

⁷⁸ *Supra* (n6) at para 31.

the scope of employment, which served to dismiss all cases of sexual harassment, since the authorities did not accommodate sexual harassment within the scope of employment.⁷⁹

It will be emphasized that the pitfalls of the strict application of vicarious liability in the United States like in South Africa, Canada, and United Kingdom served to exclude sexual harassment from the scope of the employment as it was considered personal and isolated. The feminist theory instigated by Catherine MacKinnon in her book 'Sexual Harassment of Working Women' - (1979) on regarding sexual harassment as a case for gender discrimination was instrumental in transforming the law on sexual harassment in the United States to the advantage of sexual harassment victims. It is will be outlined how the United States courts developed the supervisor-approach as a fitting response to sexual harassment in the workplace to truly capture the essence of the risk of abuse inherent in the supervisor's delegated power.

7.4.1 Recognized forms of sexual harassment in the United States

Hostile environment harassment constitutes grounds for an action only when the conduct is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment'.⁸⁰ In short, therefore, hostile environment harassment 'arises in situations in which an employee must endure verbal and physical abuse as part of her employment'.⁸¹

⁷⁹ *Corne and DeVane v Bausch & Lomb Inc* 390 F Supp 161 (D Ariz 1975); *Tomkins v Public Service Electric & Gas Co* 422 F Supp 553 (D NJ 1976); *Miller v Bank of America* 418 F Supp 233 (ND Cal 1976); and *Rabon v Guardsmark Inc* 571 F 2d 1277 (4th Cir 1978).

⁸⁰ *Meritor Savings Bank, FSB v Vinson* 477 US 57 (1986) at 67 quoting *Henson v City of Dundee* 682 F 2d 897 (1982) at 904.

⁸¹ A Juliano and SJ Schwab 'A Sweep of Sexual Harassment Cases' (2001) 86 *Cornell L Rev* 548 at 565.

Quid pro quo harassment has the effect of a tangible employment action, which includes, but not limited to, demotion, firing, or unfavourable changes in work assignment.⁸² The EEOC has reaffirmed that the employer is always liable, without recourse to the affirmative defence, for harassment by a supervisor that culminates in a tangible employment action. EEOC defined tangible employment action as follows:

1. A tangible employment action is the means by which the supervisor brings the official power of the enterprise to bear on subordinates, as demonstrated by the following:
 - it requires an official act of the enterprise;
 - it usually is documented in official company records;
 - it may be subject to review by higher level supervisors; and
 - it often requires the formal approval of the enterprise and use of its internal processes.
2. A tangible employment action usually inflicts direct economic harm.
3. A tangible employment action, in most instances, can only be caused by a supervisor or other person acting with the authority of the company.⁸³

Supervisory harassment encompasses *quid pro quo* because 'sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity'.⁸⁴ In *quid pro quo* harassment there is an element of reciprocity involved and thus 'if a supervisor continually pinches or grabs an employee but never hinges on a tangible employment action, a *quid pro quo* claim would not succeed' but alternatively would 'have a hostile environment claim'.⁸⁵ It follows therefore that an example of *quid pro quo* harassment is a supervisor's demand of 'sleep with me or I'll fire you'.⁸⁶

Could an element of reciprocity be implied from the relationship between the parties for example, a playboy magazine editor pressuring a model, who is auditioning for a part in his editorial, to have sex with him?

⁸² *Burlington Industries, Inc v Ellerth* 524 US 742 (1998) at 753-4 and *Faragher v City of Boca Raton* 524 US 775 (1998) at 791.

⁸³ EEOC Enforcement Guidance at Ch IV (B).

⁸⁴ CA MacKinnon *Sexual Harassment of Working Women: A Case of Sexual Discrimination* (1979) at 32.

⁸⁵ *Juliano op cit* (n81) 565.

⁸⁶ *Juliano op cit* (n81) 564.

This question must be answered in the affirmative. It is suggested that an element of reciprocity can be both express and implied because the essence of *quid pro quo* harassment is the granting or denial of a benefit or privilege in exchange for sexual considerations. Reciprocity can be implied where the harasser uses submission to or rejection of his sexual advances as the basis for decisions such as employment, short-listing for final selection of a role or task, performance appraisal, or the basis for favourable evaluation or recommendations.⁸⁷

The distinction between a *quid pro quo* and hostile environment harassment has different repercussions for employers in the United States. The employer is subject to strict vicarious liability, without recourse to the affirmative defence, in *quid pro quo* harassment.

7.4.2 Scope of employment

The best-simplified analysis of the basis of vicarious liability is an illustration of a coffee spill, which is worth quoting at length, as follows:

Assume that a patron is having breakfast at a coffee shop and the server has spilled hot coffee on her hand... Some courts explain that the employer is liable because the wrongful act is incidental to the employee's legitimate work activities. Others explain that the employer is liable because the injury was foreseeable... Some treat the injuries as an inherent risk of having employees. Still others hold the employer responsible because it is in the best position to insure against injuries... Here again, the employer's liability is not premised on fault; it is vicariously liable... Finally, what if instead of spilling coffee, the employee attacked a customer or co-employee with a frying pan? Even if the job did not include cooking (let alone attacking people with frying pans), the mere fact that the attack occurred on the job would often be sufficient to impose vicarious liability on the employer.⁸⁸

What is worth noting in the extract above is that MacKinnon concedes that what grounds vicarious liability within the scope of employment is the wrongful act, which occurred on the premises of the employer, whilst on the

⁸⁷ See US EEOC Guidelines, which define *quid pro quo* to include instances where submission to such sexual advances is made either explicitly or implicitly a term or condition of an individual's employment.

⁸⁸ DB Oppenheimer 'Employer Liability for Sexual Harassment by Supervisors' in *Directions in Sexual Harassment Law* CA MacKinnon and RB Siegel (2004) at 273–4.

job and whilst executing the instructions of the employer. It is submitted that this is exactly the case with sexual harassment because it occurs on the job, on the premises of the employer (the location is irrelevant where the employee is not desk bound) and whilst executing the instructions of the employer.

It is also interesting to observe that MacKinnon did not make a hypothetical example of 'what if the waiter had sexually harassed a patron at the restaurant'. Instead, she makes an example of 'assault' – it is suggested that the nature of assault should not be important. What if the server had sexually assaulted the patron? There are other factors other than that sexual harassment occurred on the job, which are relevant in determining the scope of employment and the strength of connection between the wrongful conduct and the employment.

Based on the judicial precedent on the occurrence of sexual harassment on the job applying the scope of employment test, it can only be assumed that MacKinnon was avoiding an inevitable conclusion that the court would have found that the server had disassociated himself from his employment when he sexually harassed a patron. This is so because the United States jurisprudence on sexual harassment had not developed the scope of employment to cover sexual harassment on the job.

In the United States, the courts applied the traditional scope of employment test to establish vicarious liability on the part of the employer. This test was applied restrictively and evidenced problems with the application of the 'scope of employment' test in sexual harassment cases. The development of law on sexual harassment in the United States only saw the light of the day when the scope of employment test was later abandoned for a gender discrimination and supervisory harassment approach to sexual harassment.

Sexual harassment was viewed as too personal in nature and too remote from the scope of employment to be considered part thereof. In *Corne*

and *DeVane v Bausch & Lomb Inc*⁸⁹ the court dismissed a sexual harassment claim in that it did not fall within the scope of employment. The court held that the employee's conduct of sexual harassment was nothing more than a 'personal proclivity, peculiarity, or mannerism'.⁹⁰

Judge Frey went on to say that nothing in the complaint alleges nor can it be construed that the conduct complained of was company directed policy, which deprived women of employment opportunities. In dismissing a claim of sexual harassment, the court concluded that an outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another.⁹¹ The court felt that the only way an employer could avoid charges of sexual harassment would be to have employees who are asexual.⁹²

MacKinnon correctly asserts that the inference drawn in *Corne*⁹³ is that a practice that is not related to the nature of the employment is 'not employer policy', hence cannot ground a discrimination claim, is simply wrong.⁹⁴ It is highlighted that there is a definite flaw with the strict application of the traditional scope of employment, which excludes sexual harassment as a workplace practice, but instead regards it as a private matter. The implication of the view that sexual harassment is 'personal' is that there is nothing wrong with sexual harassment to justify legal interference. The reality is that sexual harassment is an unacceptable norm characteristic of ordinary professional relations in the workplace. It is argued that sexual harassment can no longer be regarded as a natural and personal phenomenon, which women must live with and not bring to the courts for legal protection and legal redress for the resultant harm suffered.

⁸⁹ *Supra* (n79).

⁹⁰ *Supra* (n79) at 163.

⁹¹ *Ibid.*

⁹² *Supra* (n79) at 164.

⁹³ *Ibid.*

⁹⁴ MacKinnon *op cit* (n84) 94.

In *Tomkins v Public Service Electric & Gas Co*⁹⁵ a female clerk had gone out to lunch with her supervisor with the expectation of discussing her promotion. Instead, her supervisor became intoxicated and made sexual advances on her and threatened retaliation when she attempted to leave the restaurant. He then proceeded to talk of having sex with her and then kissed her. In dismissing the plaintiff's claim, the court held that:

Natural sexual attraction can be subtle. If the plaintiff's view were to prevail, no superior could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time. And if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrimination if a promotion or a raise is later denied to the subordinate, we would need 4,000 federal trial judges instead of some 400.⁹⁶

Franke⁹⁷ opines that the view adopted by the court in *Tomkins*⁹⁸ is that 'sexual content or coercion in the workplace relationships is merely the inevitable result of a sexually heterogeneous workplace' and 'it is a price women pay for participating equally in the public sphere'. It is suggested that this view instigated the fight to protect women and to liberate them from the bondage of inequality, patriarchy, and discrimination, which served to deprive women of their hard-earned equality, freedom, and integrity.

In *Miller v Bank of America*⁹⁹ the court framed the issue of employer liability for the employee's wrongful acts as 'whether Title VII was intended to hold an employer liable for what is essentially the isolated and unauthorised sex misconduct of the employee to another'. The court was of the view that 'the attraction of males to females and females to males is a natural sex phenomenon'.¹⁰⁰ The court concluded that because the sexual harassment incidents were 'isolated' and 'personal' non-employment related events for which the employer could not be held vicariously liable.

⁹⁵ *Supra* (n79).

⁹⁶ *Supra* (n79) at 557.

⁹⁷ KM Franke 'What is Wrong with Sexual Harassment' (1997) 49 *Stan L Rev* 691 at 700.

⁹⁸ *Supra* (n79).

⁹⁹ *Supra* (n79) at 234.

¹⁰⁰ *Supra* (n79) at 236.

Statistics¹⁰¹ however, refute this finding. Sexual harassment is not personal to the victim so as not to warrant employer and legal intervention. The reality is that sexual harassment is a violation of human rights and a violation of a woman's right to work in an equal opportunities work environment free from unwanted sexual advances.

MacKinnon strongly condemns the omission of the employment nexus in the use of the term 'personal' in sexual harassment and observes that:

One function of the uses of the term is to individuate, devalue, pathologize and isolate women's reactions to an experience which is common and shared, practically without variation, by countless women.¹⁰²

It is suggested that the use of the term 'personal' is often used to justify sexual harassment as a natural phenomenon and serves to trivialise it by removing it from the spotlight and public arena, justifying lack of legal intervention to the problem of sexual harassment. It is argued that it serves to perpetuate male dominance and maintains the status quo of gender discrimination in the workplace. It also amounts to failure to acknowledge that there is fire even when there is a clear cloud of smoke up in the air. Furthermore, it demonstrates failure to protect women even when they are crying for help and serves to discourage women in their efforts of breaking the silence by being considered as having suffered a rare, unheard of, and isolated incident.

It is emphasized that to consider sexual harassment a natural phenomenon between males and female species is to imply that it is static and as natural as God-made. Any attempt to characterise sexual harassment as 'trivial' serves to treat sexual harassment as a *de minimis* incident meaning the 'law does not concern itself with trifles'¹⁰³ yet ironically, it is an astronomical problem. It is thus suggested that the only scope for a *de minimis* rule is in the case of a hypersensitive plaintiff where objectively, the conduct complained of would not have offended a person of ordinary sensibilities in the position of the plaintiff.

¹⁰¹ See footnote 1 in chapter one.

¹⁰² MacKinnon *op cit* (n84) 87.

¹⁰³ Available at <http://www.lib.uct.ac.za/law/Info/latin.htm#D> (accessed 23 March 2006).

The court's lack of finding a link between sexual harassment and the scope of employment is also evident in the case of *Rabon v Guardsmark Inc*¹⁰⁴ where the security guard on duty raped the plaintiff he was employed to guard, and was the last person to leave the building she worked in at night. The court held:

The assault was to effect Roberts' independent purpose, and it was not within the scope of his employment. The mere fact that the tort was committed at a time that Roberts should have been about Guardsmark's business and that it occurred at the place where the guard was directed to perform Guardsmark's business does not alter these conclusions.¹⁰⁵

The court dismissed this case because it was of the view that the plaintiff's sexual assault was not in the scope of employment nor was it committed in furtherance of the employer's business. Instead, the sexual assault was found to be in furtherance of the employee's independent purpose and actuated by employee's personal desires.

In *Childers v Shasta Livestock Auction Yard Inc*¹⁰⁶ the court found in favour of the plaintiff and held the employer vicariously liable for injuries sustained by an employee whilst off site. In this case, the employer routinely furnished alcohol on the premises to customers and employees to encourage good customer relations. The court emphasized the fact that Childer's injuries occurred away from the work site, did not bar the employer's vicarious liability for the employee's drunken driving because it was a regular practice for the employer to furnish alcoholic beverages on the premises. The court thus held that when an employee undertakes after-work drinking that causes the employee to:

...become an instrumentality of danger to others, even where the danger manifests itself at times and locations remote from the ordinary workplace, the employee is still acting within the scope of his employment.¹⁰⁷

¹⁰⁴ Supra (n79).

¹⁰⁵ Supra (n79) at 1279. Compare to *NK (CC)* supra (n7) where the Constitutional Court held that the policemen were not on the frolic of their own so as to render their conduct to be outside the scope of employment because when committing the rape, they were simultaneously omitting to perform properly their constitutional and statutory duties as policemen which they owed to K.

¹⁰⁶ 190 Cal App 3d 792, 235 Cal Rptr 641 (Cal Ct App 1987).

¹⁰⁷ Supra (n106) at 794.

It is observed that the *Childers* judgment¹⁰⁸ is a typical example of flaws of applying the scope of employment test and is evidence of how reluctant and resistant the United States courts were in upholding values of equality and protection of dignity of women in the workplace. If the court in *Childers*¹⁰⁹ could find an occurrence resulting from a voluntary drinking spree of the plaintiff as being within the scope of employment, then by the same token, the perpetrator of sexual harassment could become an 'instrumentality of danger' to women. This is so because sexual harassment bolsters a hostile, abusive, menacing, and discriminatory environment.

In *Ira S Bushey & Sons, Inc v United States*¹¹⁰ the court read the scope of employment more widely to allow a claim of vicarious liability against an employer for intentional torts that were in no sense actuated by any purpose to serve the employer. The court held that the employer was vicariously liable for damages to a day dock caused by a drunken sailor who was returning to a ship from a night's liberty.¹¹¹ Judge Henry Friendly described the basis of the principle *respondeat superior* as the 'deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may be fairly said to be characteristic of its activities'.¹¹²

Similarly, abuse of authority by policemen which occurred in *NK (CC)*¹¹³ is a risk which may be fairly regarded as 'typical of or broadly incidental to the enterprise undertaken by the employer'.¹¹⁴ Furthermore, abuse of authority is an inherent risk of running a police enterprise in that police are in a powerful position to protect and serve the community, and

¹⁰⁸ *Supra* (n106).

¹⁰⁹ *Ibid.*

¹¹⁰ 398 F 2d 167 (2d Cir 1968).

¹¹¹ The sailor was on a frolic of his own when he went on a drinking spree and as much as the sailor had become drunk while on liberty and far off base, the court noted that drinking on leave was so common a part of naval life that the sailor's drunken return to ship could fairly be deemed to be characteristic of the military enterprise.

¹¹² *Supra* (n110) at 171.

¹¹³ *Supra* (n7).

¹¹⁴ *Rodger v Kemper Construction Company* 50 Cal App 3d 608 at 619, 124 Cal Rptr 143 (4th Dist 1975) at 149.

may thus exploit the vulnerability of the people in need of their assistance similar to supervisors who are likely to abuse or misuse their authority over their subordinates.

In *Taber v Maine*¹¹⁵ the court specifically premised the principle of vicarious liability on the view 'that the employer should be liable for those faults that may fairly be regarded as risks of his business, whether they are committed in furthering it or not'. It is argued that the cumulative effect of the wider interpretation of the scope of employment would thus support treating all cases of sexual harassment as potentially within the scope of employment because such behaviour is distinctive of workplace activities and a risk inherent in human relations in the workplace.

In *Faragher v City of Boca Raton* the court examined case law on vicarious liability and noted that courts have read the scope of employment widely:

...to hold employers vicariously liable for employees' intentional torts, including sexual assaults, that were not done to serve the employer, but were deemed to be characteristic of its activities or a foreseeable consequence of its business.¹¹⁶

The court acknowledged that 'it is well recognized that hostile environment sexual harassment by supervisors (and, for that co-employees) is a persistent problem in the workplace' and an employer can, in a general sense, 'reasonably anticipate the possibility of such conduct occurring in its workplace'.¹¹⁷ It is submitted that this means that the employer assumes sexual harassment as one of the risks and costs of running a business enterprise. MacKinnon therefore correctly states that the term 'personal' serves to 'defeat the contention that the incident is employment related' and that 'even though the incident occurred on the job,' somehow it has 'nothing to do with work'.¹¹⁸

¹¹⁵ 67 F 3d 1029 (2d Cir 1995) at 1037.

¹¹⁶ *Supra* (n82) at 776.

¹¹⁷ *Supra* (n82) at 798.

¹¹⁸ MacKinnon *op cit* (n84) 85-6.

7.4.3 Supervisory harassment

It is emphasized that abuse of trust; authority and power are really the essence of workplace sexual harassment and include both the authority to act in compliance with or contrary to terms of employment. This implies the risk of acting outside the employer's instructions.¹¹⁹ MacKinnon has correctly stated that supervisory harassment 'located institutional responsibility proximate to institutional reality: institutional hierarchy facilitates sexual use of subordinates by superiors in violation of the employer's duty not to discriminate'.¹²⁰ It is suggested that the supervisor is put on the pedestal in the workplace since he is entrusted with organizational power; care and welfare of the employees; authority; and influence over employment decisions. The supervisor's organizational position presents a strong risk of sexually harassing women, which is likely to lead to abuse of power and effect a tangible employment action.

Abuse of delegated authority by a supervisor is a ground for finding the employer vicariously liable because:

[T]he scope of supervisory employment may be treated separately because supervisors have special authority enhancing their capacity to harass and the employer can guard against their misbehaviour more easily.¹²¹

The employer can guard against supervisory misconduct 'more easily because their numbers are fewer than the numbers of regular employees'.¹²² It is submitted that an employer is responsible for the acts of its supervisors, and should be encouraged to prevent supervisory harassment. It is the powerful authority of the supervisor and his ability to misuse his power to the detriment of his subordinates, which is the essence of sexual harassment in the workplace.

¹¹⁹ See also *NK (CC)* supra (n7).

¹²⁰ CA MacKinnon *Women's Lives, Men's Laws* (2005) at 180.

¹²¹ *Faragher* supra (n82) at 776-7.

¹²² *Faragher* supra (n82) at 801.

The supervisor's ability to intimidate, discriminate, and create a hostile environment was also discussed in *Meritor Savings Bank, FSB v Vinson*¹²³ where the court held:

A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace. There is no reason why abuse of the latter authority should have different consequences than abuse of the former. In both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates.

The court held that a supervisor, whether or not he possesses the authority to hire, fire, or promote, is necessarily an 'agent' of his employer for all Title VII purposes, since even the appearance of such authority may enable him to impose himself on his subordinates.¹²⁴ It is observed that the supervisor is thus an agent, a mouthpiece and an alter-ego of the employer. The subordinates are duty-bound to obey the instructions of the supervisor as being the instructions of the employer. It is suggested that it is the subservient position of the subordinate, which creates a risk and an opportunity for abuse of supervisory power. It is thus fair in terms of section 60(3) of the EEA for supervisory harassment to be inferred to the employer, and for gender discrimination perpetrated by the supervisor to be deemed to be perpetrated by the employer.

In *Vinson v Taylor*¹²⁵ the district court held the employer vicariously liable for acts of sexual harassment committed by its supervisor even though such sexual harassment may have been outside the scope of employment. The court noted that:

Confining liability, as the *common-law* would, to situations in which a supervisor acted within the scope of his authority conceivably could lead to the ludicrous result

¹²³ *Supra* (n80) at 76-7.

¹²⁴ *Supra* (n80) at 70.

¹²⁵ 753 F 2d 141 (DC Cir 1985).

that employers would become accountable only if they explicitly require or consciously allow their supervisors to molest women employees.¹²⁶

The court thus correctly acknowledged the narrow approach of the 'scope of employment' and refused to rely on the principle of *respondeat superior* as a basis for employer liability for unlawful acts of its agents. It would be contrary to the spirit of anti-discrimination legislation (which includes both the Constitution and the EEA) if sexual harassment was considered to be within the scope of employment only if it was the supervisor's designated duty to molest women.

The Supreme Court in *Burlington Industries, Inc v Ellerth* examined vicarious liability for an intentional tort committed by a supervisor and explained further why a tangible employment action justifies holding an employer vicariously liable for a supervisor's intentional tort of sexual harassment:

When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury... But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control.¹²⁷

It is emphasized that it is the position of unequal power between the supervisor and his subordinates, which enhance the supervisor's ability of, harass because 'the victim may well be reluctant to accept the risks of blowing the whistle on a superior'.¹²⁸ This is so because when the supervisor:

discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker.¹²⁹

¹²⁶ *Supra* (n125) at 151.

¹²⁷ *Supra* (n82) at 761-2.

¹²⁸ *Faragher supra* (n82) at 803.

¹²⁹ *Ibid.*

It is for these reasons that in the United States the employer is vicariously liable, without recourse to the affirmative defence, for supervisory harassment, which results in a tangible employment action or tangible employment benefit.¹³⁰

The Court of Appeals in *Jin v Metropolitan Life Insurance*¹³¹ held that in requiring Jin to show an 'adverse employment action' was contrary to the plain language of *Ellerth* and *Faragher* cases,¹³² both of which cited positive employment actions such as 'hiring' and 'promotions' as kinds of tangible employment actions that would make the affirmative defence unavailable. The court went on to explain that the employer should automatically be liable where 'the employee rejects the demands and is subjected to an adverse tangible employment action or submits to the demands and consequently obtains a tangible job benefit'.¹³³ It is argued that in such instances the supervisor has misused the power bestowed upon him by the agency relationship with the employer.

For *quid pro quo* harassment, it is not necessary that the plaintiff must refuse to submit to sexual demands and suffer a tangible employment action. It is submitted that *quid pro quo* harassment also covers instances where a plaintiff for fear of suffering a tangible employment action, submits to sexual demands and thereby gains a tangible employment benefit.¹³⁴ The reciprocity element is present in that the retention of her job was conditioned on compliance with the sexual demands because the supervisor is aided by his organizational power to effect economic decisions.

In the United States, the critical issue in supervisory harassment, therefore, is whether the victim has suffered a tangible employment action. If

¹³⁰ *Ellerth* supra (n82) at 745.

¹³¹ 310 F 3d 84 (2d Cir 2002) at 93.

¹³² *Supra* (n82).

¹³³ *Supra* (n131) at 95.

¹³⁴ See the 2005 Code – which differentiates between victimization that is an equivalent of an adverse employment action and favouritism – which is an equivalent of a positive employment action.

so, the *Ellerth* and *Faragher*¹³⁵ affirmative defence would be unavailable to the employer, and the employer would automatically be vicariously liable for the supervisor's sexual harassment. The employer is vicariously liable for supervisory harassment because:

[T]he employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.¹³⁶

It is suggested that the supervisor is always significantly aided, in committing sexual harassment, by organization power; the agency relationship with his employer; and his human resources responsibilities, which involve intimate contact with the subordinates. Furthermore, the supervisory position creates a close link between the employment and the wrongful conduct since the dominant position of the supervisor helps him bring sexual harassment into fruition. The 'causal link' highlighted in *Bazley*¹³⁷ is present in supervisory harassment in that the nature of the supervisor's fiduciary position materially increases the risk of the supervisor misusing the employment to commit sexual harassment. It is for this reason that the courts in *Faragher* and *Ellerth*¹³⁸ established an efficient solution by way of employer's vicarious liability for supervisor's wrongful conduct.

7.4.4 Hostile environment harassment and the affirmative defence

The affirmative defence is only available in hostile environment sexual harassment. Hostile environment harassment exists where gender discrimination exists in the workplace and a work environment is thereby poisoned. In *Meritor Savings Bank, FSB v Vinson*¹³⁹ the court stated that for sexual harassment to be actionable, it must be sufficiently severe or pervasive

¹³⁵ *Supra* (n82).

¹³⁶ *Faragher supra* (n82) at 803.

¹³⁷ *Supra* (n6).

¹³⁸ *Supra* (n82).

¹³⁹ *Supra* (n80) at 67.

to alter the conditions of the victim's employment and create an abusive working environment. In *quid pro quo* harassment, liability is strict and the affirmative defence is not available to the employer to shield itself from vicarious liability. In hostile environment sexual harassment, the employer will be found vicariously liable unless he can prove and satisfy the two-prong defence test.

To establish the affirmative defence to counter the risk of automatic liability or limit damages, the employer must prove, by adducing evidence that, firstly, he 'exercised reasonable care to prevent and correct promptly any harassing behaviour'.¹⁴⁰ Secondly, the employer must prove that the plaintiff 'unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise'.¹⁴¹ It is argued that the second prong of the affirmative defence is consistent with section 60(1) of the EEA, which enjoins the plaintiff to report sexual harassment 'immediately' thereby giving the employer an opportunity to come to her rescue and remedy gender discrimination. This means that the employee must attempt to cut her losses and mitigate any harm occasioned by sexual harassment.

The second prong shifts focus to the employee's conduct in her unreasonable failure to mitigate her losses in response to sexual harassment by taking advantage of the preventative and corrective opportunities put in place by the employer. The second prong of the United States affirmative defence and section 60(1) of the EEA seek to keep vicarious liability of the employer within reasonable bounds since *common-law* vicarious liability is strict liability and thus has a risk of imposing open-ended liability on the employer. The court in *Faragher* established that:

While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need

¹⁴⁰ *Faragher* supra (n82) at 778 and *Ellerth* supra (n82) at 745.

¹⁴¹ *Ibid.*

for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.¹⁴²

This view is consistent with the 2005 Code, which states that the adoption of a sexual harassment policy and dissemination of the contents of the policy to employees is relevant when establishing the affirmative defence in section 60(4) of the EEA when considering whether the employer has discharged its obligations in terms of section 60(2).¹⁴³

It is submitted that the first prong of the affirmative defence implies that vicarious liability is an extension of personal liability in that an employer is held vicariously liable not so much for the wrongful conduct of its employees but for its own failure to take meaningful steps to safeguard the workplace against sexual harassment. In other words, in the light of the affirmative defence, the employer will be immune if it can prove that it adopted a pro-active and reactive approach; and played its part to prevent sexual harassment and if sexual harassment occurred, took effective steps to remedy it. This means that the employer must do all that a diligent employer could reasonably do to guard against the risk of sexual harassment and deal with it promptly when it occurs.

An observation is made that the United States law on the affirmative defence could assist a court in determining whether an employer is personally at fault (negligent) in a civil claim for damages under the 'aquilian action'. The affirmative defence would not be a defence as such in a civil suit but an aspect of negligence on the part of the employer that would have to be proved by the plaintiff. It is argued that in order to successfully invoke the affirmative defence the employer must demonstrate that:

- a) It complied with its duty of care to protect and safeguard the dignity and integrity of women against the harm of sexual harassment; and

¹⁴² *Ibid.*

¹⁴³ See item 7.3 2005 Code. See ch 6.2 on the discussion of *statutory* vicarious liability in terms of section 60 of the EEA.

- b) It did all within its powers to eliminate the discriminatory practices, conditions, and terms in employment in an effort to root out sexual harassment in the workplace.

The United States court cases have provided constructive guidelines on what amounts to reasonable and practicable steps sufficient in the court's view to successfully invoke the affirmative defence and exonerate the employer from vicarious liability, as follows:

- a) The affirmative defence requires the employers to prove two necessities and is not framed in the alternative with the use of 'or' but has a conjunction (to prevent) 'and' (correct promptly).¹⁴⁴ It is submitted that in order to escape vicarious liability, the employer must therefore demonstrate that it undertook reasonable efforts to prevent and correct the alleged sexual harassment.
- b) Judgment in the employer's favour was proper where the employer had exercised reasonable care in preventing and promptly correcting sexual harassment and the plaintiff likewise had fulfilled her duty to complain promptly about the alleged harassment.¹⁴⁵
- c) The employer, who instituted an investigation into sexual harassment complaint one day after plaintiff's report, took disciplinary action against harasser, notified plaintiff in writing of actions taken and revised workplace policy because of incident could not be held liable for sexual harassment.¹⁴⁶
- d) The affirmative defence will fail due the employer's inaction in the face of the plaintiff's complaints of harassment, and failure to implement any sexual harassment or grievance policy for the protection of its employees.¹⁴⁷

¹⁴⁴ *Fall v Indiana University Bd of Trustees* 12 F Supp 2d 870 (ND Ind 1998).

¹⁴⁵ *Indest v Freeman Decorating Inc* 164 F 3d 258 (5th Cir 1999).

¹⁴⁶ *McGhee v Treasure Chest Casion, LLC* 1998 WL 187699 (ED La 1998).

¹⁴⁷ *Harris v L&L Wings Inc* 132 F 3d 978 (4th Cir 1997).

- e) The affirmative defence will succeed where the employer has an anti-harassment policy and its response to complaints of sexual harassment was prompt and reasonable.¹⁴⁸
- f) The employer must take steps to put an end to sexual harassment once its occurrence has come to its knowledge and will thus not be liable where it promptly reprimanded the harasser, investigated the incident, suspended, and reassigned the harasser.¹⁴⁹
- g) An affirmative defence will fail where the employer maintained a comprehensive sexual harassment policy that was vigorously enforced but had failed to communicate, disseminate it and make known its grievance procedure to all employees.¹⁵⁰

It is worth noting *Bernard v Calhoon MEBA Engineering School*¹⁵¹ where the court gave judgment in employer's favour on grounds that he had acted promptly despite the deficiency in its internal sexual harassment policy. The court was indifferent by the anti-harassment policy of the Calhoon MEBA Engineering School and held that it was constrained to address, at the outset, a 'stark deficiency' in Calhoon's anti-harassment policy.¹⁵² The school's harassment policy directed that workplace harassment complaints be reported 'to one of only two people: the Human Resources Manager or the Director of the School'.¹⁵³ The reporting line was so restrictive that Judge Davis was 'not prepared to find that the harassment policy was reasonable as a matter of law'.¹⁵⁴

The court noted that the 'stark deficiency' in the school's policy was the limitation to two individuals and the failure to expand those options to include, at a minimum, all school supervisors and managers who were

¹⁴⁸ *Scrivner v Socorro Independent School District* 169 F 3d 969 (5th Cir 1999).

¹⁴⁹ *Mikels v City of Durham* 183 F 3d 323 (4th Cir 1999).

¹⁵⁰ *Nuri v PRC, Inc* 13 F Supp 2d 1296 (MD Ala 1998).

¹⁵¹ 309 F Supp 2d 732 (D Md 2004).

¹⁵² *Supra* (n151) at 740.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

readily accessible to workers in the workplace. Despite having a flawed anti-harassment policy, the school was still granted summary judgment. Bernard complained to a supervisor that a co-worker made racially offensive remarks. The supervisor immediately relayed that complaint to the human resources manager, sought out the co-worker, and made him apologize. On the facts, the human resources manager came to the school the next day to address the complaint; met with the co-worker, secured his promise to stop his remarks; and was warned that he would be disciplined if he did not stop. The court found that these prompt actions worked because Bernard did not report any further offensive remarks by co-workers.

It is argued that this proves that substance over matter is material in giving effect to the spirit of the sexual harassment policy. It is established that anti-harassment policies are key documents in fighting sexual harassment in the workplace because they are the essence of the employer's compliance with its duty to eliminate gender discrimination; to uphold and promote gender equality; and to ensure zero tolerance to sexual harassment in the workplace. The employer's written commitment to zero tolerance to sexual harassment must be evidenced in the spirit of the harassment policy and employer-culture in the workplace. Employees should be encouraged by the language of the sexual harassment policy to complain to any company supervisor or manager possibly even those at other company locations. In *Bernard*,¹⁵⁵ the employer was vindicated by the fact that, even though its sexual harassment policy was flawed, it had taken immediate steps to correct sexual harassment once it was brought to its attention.

It is argued that *Bernard*¹⁵⁶ is distinguishable from *Media 24 Limited, Gasant Samuels v Sonja Grobler*¹⁵⁷ where the employer was not exonerated by the fact that he had a sexual harassment policy in place because it failed to act once

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ [2005] 7 BLLR 649 (SCA) at para 71.

sexual harassment had come to its attention. Therefore, the employer's failure to act aggravated damages incurred by the plaintiff because sexual harassment persisted. It is submitted that an effective and well-communicated sexual harassment policy and grievance procedures are key to an employer's ability to raise the affirmative defence with success.

7.5 Canada's approach to vicarious liability

The development of the principle of vicarious liability in Canada has been of fundamental importance in influencing the development of law on sexual harassment in South Africa, United States, and United Kingdom to expand the scope of vicarious liability to include intentional wrongdoing; frolic of one's own; negation of duties; and abuse of trust and organizational power. The Canadian courts apply an enterprise risk test of vicarious liability (the enterprise and employment must substantially contribute to the risk). This is similar to the enterprise risk principle adopted in *Minister Police v Rabie* where Jansen JA held that in assessing whether acts fell within the scope of employment from the:

...angle of creation of risk, the emphasis is shifted from the precise nature of the link between the acts of the employee and police work, to the dominant question whether those acts fall within the risk created by the State.¹⁵⁸

Viewed this way, Jansen JA seems to downplay the causal element, which is important in establishing the extent to which employment causally contributed and enabled the commission of the wrongful conduct. It is suggested that the causal element is essential in controlling a floodgate of litigation where a mere coincidence between the employment and the wrong, with nothing more, will be considered sufficient to ground vicarious liability. The causal element is also important in keeping *common-law* vicarious liability within reasonable limits since it is a no-fault liability and therefore should be applied with caution. Vicarious liability would in all probability not be

¹⁵⁸ *Supra* (n51) at 134I.

imposed on the employer given the absence of a close nexus between the employee's duties and his wrongful acts.

7.5.1 The 'enterprise risk' test

In *Jacobi v Griffiths*¹⁵⁹ the employer was insulated from vicarious liability for the sexual abuse performed by its employee on the children placed under its care in that such acts constituted independent initiatives on the part of the employee for his personal gratification. There was essentially a single incident of sexual assault by G involving the male appellant and one incident of sexual intercourse involving the female appellant at G's home outside working hours following several lesser incidents, including one incident of sexual touching in the club van.

The court applied the strong connection test of vicarious liability and held that there must be a material increase in the risk of harm in the sense that the employment significantly enhanced the occurrence of harm.¹⁶⁰ The court of appeal, in dismissing a claim for vicarious liability reasoned that while the vulnerability of children provides the appropriate context in which the respondent's enterprise is to be evaluated, vulnerability does not itself provide the 'strong link' between the enterprise and the sexual assault that imposition of no-fault liability would require.¹⁶¹

The court went on to hold that other than the van incident, G's assaults all took place off site, at his home and after hours. The court relied heavily on these factors and weighed them against holding the club liable for the G's torts, reinforcing that G's conduct was perverse personal frolic, wholly unrelated to the scope of his employment.¹⁶² The court noted that where the

¹⁵⁹ [1999] 2 SCR 570.

¹⁶⁰ *Supra* (n159) at para 79.

¹⁶¹ *Supra* (n159) at para 86.

¹⁶² *Supra* (n159) at para 20.

chain of events constituted independent initiatives undertaken for the employee's own personal gratification, the ultimate sexual abuse was too remote from the employer's enterprise to justify strict liability.¹⁶³

On the facts, the court noted that there was neither a job created intimacy nor a job created parental authority, which established a strong connection between the employment and the sexual assault, to warrant a finding of a no-fault liability.¹⁶⁴ The court thus felt justified in not imposing vicarious liability on the employer since G had deviated from the scope of employment and was on a frolic of his own when he sexually assaulted his victims. It is argued that the court rigidly applied the scope of employment test and did not take into account all relevant factors in determining whether there was a sufficiently close nexus between the employment and the sexual assault, which enhanced the risk of harm. The court concentrated on the factors, which severed the link of connection between the employment and the wrongful conduct – instead of similarly weighing up the factors, which strengthened the connection between the employment and the wrongful conduct.

*Jacobi*¹⁶⁵ is distinguishable from *Carmichele v Minister of Safety and Security*¹⁶⁶ where the South African Constitutional Court highlighted the relevance of the vulnerable status of women in the society, which makes them prone to exploitation and sexual attack. The Constitutional Court emphasized that:

Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.¹⁶⁷

It is argued that freedom from sexual harassment is essential in the emancipation of women in a democratic society because it is an affront to

¹⁶³ Supra (n159) at para 81.

¹⁶⁴ Supra (n159) at para 84.

¹⁶⁵ Supra (n159).

¹⁶⁶ 2001 (4) SA 938 (CC).

¹⁶⁷ *Carmichele* supra (n166) at para 62.

women's liberty, dignity, equality, and security of the person. The vulnerable status of women provides a strong link in sexual harassment in the workplace, between the employment and the wrongful conduct.

In a landmark Canadian judgment of *Bazley v Curry*¹⁶⁸ the court revived the principle of vicarious liability on the part of the employer and found the employer liable for the delict committed by its employee. This case is a leading authority in Canada on the issue of vicarious liability for intentional torts. In this case, the children's foundation hired Curry, a paedophile, to work in one of its homes for the treatment of emotionally troubled children and his duties ranged from general supervision to intimate duties like bathing and tucking in at bedtime.

The court held that the correct approach involved a two-step process for determining when an unauthorized act of an employee is sufficiently connected to the employer's enterprise that vicarious liability should be imposed. The court held that firstly, it should determine whether there are any precedents, which unambiguously determine on which side of the line between vicarious liability and no liability the case falls.¹⁶⁹ Secondly, if prior judicial precedents do not clearly suggest a solution, the court held that the next step is to openly confront the critical issue of whether vicarious liability should be imposed in light of the broader policy considerations behind strict liability.¹⁷⁰ The court recognized that vicarious liability must be viewed from a policy-driven perspective, which lies at the heart of strict liability and not as a deduction from legal principles.¹⁷¹

McLachlin J adopted a new test, in the absence of conclusive judicial precedents, in assessing whether the employer is vicariously liable for an employee's unauthorised, intentional wrong as follows:

¹⁶⁸ Supra (n6).

¹⁶⁹ Supra (n6) at para 15.

¹⁷⁰ *Ibid.*

¹⁷¹ Supra (n6) at para 26.

The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires.¹⁷²

The court cautioned that the enterprise risk test should not be applied mechanically, but with a sensitive view to the policy rationales that underlie the imposition of vicarious liability – that is to say, fair and efficient compensation for the wrong and deterrence.¹⁷³ The court noted that it lies at the heart of tort law that a person who introduces a risk incurs a duty to those who may be injured should the risk materialise into harm.¹⁷⁴ It is argued that this signifies the court's movement closer to personal liability of employer because a link is established between the employer's role in enhancing or creating the risk, which in essence creates a duty on the part of the employer to take steps, having identified such risk, to eliminate it. It is further argued that the wrong actuated by the alleged wrongdoer is linked to such enterprise-created risk, which gives rise to vicarious liability on the part of the employer.

McLachlin J went on to identify five factors (not a closed list) which are relevant in assessing whether an employer created or materially enhanced the risk of an employee committing an intentional tort and was thus vicariously liable, as follows:

- a) the opportunity that the enterprise afforded the employee to abuse his or her power;
- b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
- c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
- d) the extent of power conferred on the employee in relation to the victim; and
- e) the vulnerability of potential victims to wrongful exercise of the employee's power.¹⁷⁵

The court therefore adopted an enterprise risk test which looks at the extent to which the risk created by the enterprise substantially enabled the

¹⁷² Supra (n6) at para 41.

¹⁷³ Supra (n6) at para 46.

¹⁷⁴ Supra (n6) at para 30.

¹⁷⁵ Supra (n6) at para 41.

employee to commit a wrong. The Canadian test of vicarious liability is informative because it looks at policy considerations, totality of circumstances and relevant factors, which establish a strong link between the authorised acts (employer's creation and enhancement of the risk) and the wrongful conduct, which accrues from it. It is submitted that the enterprise risk test adopted by the Canadian Courts has a causation element in that the employment must materially enhance the risk, in the sense of substantially contributing to it, before it is fair to impose vicarious liability.

McLachlin J correctly noted that any employment that can be seen to provide the causation of an employee's tort and thus a 'mere opportunity' to commit a tort does not suffice.¹⁷⁶ The court thus summed up its judgment and held that the opportunity for intimate private control, parental relationship, and power required by the terms of employment created a special environment that nurtured and brought to fruition Curry's sexual abuse.¹⁷⁷ The court further held that the employer's enterprise created and fostered the risk that led to the ultimate harm. The abuse was thus held not to be a mere coincidence in time and place, but a product of the special relationship of intimacy and respect the employer fostered, as well as the special opportunities created for exploitation of that relationship.¹⁷⁸

It is submitted that the court will thus not concentrate on factors like time and place which merely coincide with the commission of the wrong. Instead, the court will look at the framework of the enterprise to establish key factors, which helped, assist the employee in committing the wrong. It appears therefore that 'mere opportunity' to commit a wrong is not sufficient to establish a close nexus between the employment and the wrong, but the causation element is sufficient in that the employment must materially aid the perpetrator to commit sexual harassment. The 'causation element' will help

¹⁷⁶ *Supra* (n6) at para 40.

¹⁷⁷ *Supra* (n6) at para 58.

¹⁷⁸ *Ibid.*

curb potential floodgate of litigation where an employee relies on a 'mere opportunity' provided by the employment, which did not materially enhance the risk of harm.

7.6 English law on vicarious liability

A universally applied test in English law on whether liability rests with an employer for an employee's delict is known as the 'Salmond test'. This test lays down what constitutes 'scope of employment' as follows:

A master is not responsible for a wilful act done by the servant unless it is done in the course of employment. It is deemed to be so done if it is either (a) a wrongful act authorised by the employer; or (b) a wrongful and unauthorised mode of doing some act authorised by the employer... But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them.¹⁷⁹

The first part of the Salmond test is straight-forward and presents no difficulty in its application and interpretation. Problems arise with the application of the second leg - that is to say, 'the unauthorised mode of doing some act authorised by the employer'. Sexual harassment falls within a class of acts, which forms part of the latter part of the Salmond test, which looks at the close nexus between the wrongful conduct and the acts authorised by the master. It is argued that the problem with the application of the Salmond test is mainly with intentional wrongdoing such as sexual harassment, which is done for personal gratification and does not serve the master. The reality is that sexual harassment can never be factually an unauthorised mode of doing authorised tasks but that does not mean that sexual harassment must be excluded from the scope of employment.

It is suggested that the employer will be answerable not only where the employee correctly does that which he is authorised to do but will be liable where the employee negligently does that which he is authorised to do. An

¹⁷⁹ RFV Heuston and RA Buckley *Salmond and Heuston on the Law of Torts* 21ed (1996) at 443.

employer will even be liable for acts by an employee which are not authorised if these acts are so connected with the authorised acts such as to be regarded as modes, albeit improper modes, of doing them.

7.6.1 *Trotman v North Yorkshire County Council*¹⁸⁰

In the case of *Trotman*¹⁸¹ the employer was insulated from vicarious liability and was allowed to argue that the more the employee has deviated from his authorised mode, the less likely the employer is to be held liable. This case introduced the so-called 'negation' test - that is to say, if an employee performs a wrongful act that negates the employer's duty to the plaintiff; the employer is unlikely to be vicariously liable.¹⁸² In this case, the plaintiff was mentally handicapped and suffered from epilepsy. The plaintiff suffered from fits and required nocturnal supervision, thus it was arranged that he would share a room with the deputy headmaster. On several nights during the school trip, the deputy headmaster sexually assaulted him.

The court held that:

It is useful to stand back and ask: applying general principles, in which category in the Salmond test would one expect these facts to fall? A deputy headmaster of a special school, charged with the responsibility of caring for a handicapped teenager on a foreign holiday, sexually assaults him. Is that in principle an improper mode of carrying out an authorised act on behalf of his employers, the council, or an independent act outside the course of his employment?¹⁸³

The court went on to tackle the position of care-taking for the plaintiff:

His position of caring for the plaintiff by sharing a bedroom with him gave him the opportunity to carry out the sexual assaults. But availing himself of that opportunity seems to me to be far removed from an unauthorised mode of carrying out a teacher's duties on behalf of his employer. Rather it is a negation of the duty of the council to look after children for whom it was responsible... But in the field of serious sexual misconduct, I find it difficult to visualise circumstances in which an act of the teacher

¹⁸⁰ [1999] LGR 584 (CA).

¹⁸¹ *Supra* (n180).

¹⁸² The Constitutional Court in *NK supra* (n7) applied an analogy of this negation test where the court held that breach of the employer mandate is not in itself to be viewed in isolation. In finding the employer vicariously liable, the Constitutional Court considered that rape was a simultaneous commission of a wrongful conduct and an omission of policemen's statutory and constitutional duties to protect NK.

¹⁸³ *Supra* (n180) at 591.

can be an unauthorised mode of carrying out an authorised act, although I would not wish to close the door on the possibility.¹⁸⁴

The court thus concluded that the employer was not vicariously liable and reasoned that the commission by him of acts of indecent assault on a pupil in his charge cannot be regarded as an improper and unauthorised mode of doing a job but that it was an independent act of self-indulgence or self-gratification.¹⁸⁵ The court relied on the questions of agency principle of whether the perpetrator was engaged in his master's business at the time of the commission of the tort or whether he was acting as a stranger to his master. The court was thus of the view that unless the business of the principal is to molest children, there will be denial of vicarious liability. The court also held that the sexual assault was an independent act done on an opportunity seized by the employee.

It is suggested that the court finding that sexual assault was a negation of duty is tantamount to acknowledging a link between the wrong and the nature of employment. This means that when the deputy headmaster sexually assaulted the plaintiff, he was executing his duties within the scope of employment in an improper way. The position of care in relation to the disabled plaintiff enhanced the risk of abuse of parental authority by the deputy headmaster. The deputy headmaster was thus not a stranger to his master at the time of commission of sexual assault, but was still acting in his capacity as a caretaker and confidant of the plaintiff. It is thus submitted that the court should have found the employer vicariously liable based on the negation of duty, which amounted to mismanagement of his duties - that is to say, failure to take care of the disabled plaintiff.

It is emphasized that the link is even stronger between the sexual assault and the scope of employment because the pupil in question was handicapped thereby making him more vulnerable and dependent on the

¹⁸⁴ *Ibid.*

¹⁸⁵ *Supra* (n180) at 592-3.

caretaker. The position of responsibility over the health, care and safety created a greater risk of exploitation of caretaker's authority and power over the pupil. The negation test which was adopted in *Trotman*¹⁸⁶ relies on the principle 'the greater the fault of the servant, the less the liability of the master'¹⁸⁷ which serves to exclude those acts done by the employee in dereliction of the duties owed to the employer. It is argued that this test disregards the fact that the dereliction and negation of such duties could be done within the scope of employment. It is suggested that the connection between the nature of employment and the wrongful conduct can be established by the dereliction of the duties in that the deviation can be a transgression of that which the employee is authorised to do.¹⁸⁸

It is concluded that *Trotman*¹⁸⁹ was wrongfully decided because:

- (a) It overlooked that an employee does not cease to act within the scope of employment when he deviates from his authorised tasks and disobeys his master;
- (b) Vicarious liability is not necessarily ruled out merely because the employee acted for his own benefit and self-indulgence;
- (c) It overlooked an important part of the Salmond test which enjoins the courts to look at a sufficiently close nexus between the wrong and employment;
- (d) It created a bad precedent in holding that vicarious liability cannot arise for an intentional wrongful act committed during an opportunity seized by the employee; and

¹⁸⁶ Supra (n180).

¹⁸⁷ *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716 at 733.

¹⁸⁸ See *Feldman v Mall* 1945 AD 733 where the court was of the view that the employer could be liable on application of the 'negation' test and held that a servant may omit to do his master's work or act in disobedience of his master's instructions, and if such omission constitutes a negligent or improper performance of his master's work and causes damage, the master will be liable for such damage.

¹⁸⁹ Supra (n180).

- (e) It overlooked the enhancement of risk, which created a sufficient connection because of the deputy headmaster's special position of care and trust in relation to the vulnerable and emotionally dependent plaintiff.

7.6.2 *Lister and Others v Hesley Hall Limited*¹⁹⁰

In *Lister*¹⁹¹ the House of Lords took an opportunity to revisit the 'Salmond test' and overruled *Trotman*.¹⁹² In this landmark judgment, the court widened the scope of vicarious liability to include acts of physical and sexual abuse committed during the course of employment. Lord Steyn reasoned as follows:

In my view the approach of the Court of Appeal in *Trotman v North Yorkshire County Council* [1999] LGR 584 was wrong. It resulted in the case being treated as one of the employment furnishing a mere opportunity to commit the sexual abuse. The reality was that the county council were responsible for the care of the vulnerable children and employed the deputy headmaster to carry out that duty on its behalf. And the sexual abuse took place while the employee was engaged in duties at the very time and place demanded by his employment. The connection between the employment and the torts was very close. I would overrule *Trotman v North Yorkshire County Council*.¹⁹³

This case involved a special school for boys with emotional and behavioural difficulties, which were managed by Hesley Hall, who employed G as warden and housekeeper to take care of the boys. Unbeknown to them, the warden systematically sexually abused the boys in his care. This illuminating judgment is instructive to the development of vicarious liability for sexual harassment in the workplace. The court rejected as a somewhat artificial argument the proposition that the employer should be liable for the warden's failure in its duty to report his wrongful intentions and conduct to the employer when the employer is not responsible for the wrongful act itself.¹⁹⁴

¹⁹⁰ *Supra* (n60).

¹⁹¹ *Ibid.*

¹⁹² *Supra* (n180).

¹⁹³ *Supra* (n60) at para 25.

¹⁹⁴ *Supra* (n60) at para 32.

The court endorsed the landmark decisions of the Canadian Supreme Court in *Bazley v Curry*¹⁹⁵ and *Jacobi v Griffiths*¹⁹⁶ which relied on the principle of 'close connection' when approaching vicarious liability in sexual assault cases. The court thus advocated a new test for vicarious liability and held that the correct approach is 'whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable'.¹⁹⁷ The court held that the sufficiency of the connection might be determined by asking whether the wrongful acts can be seen as ways of carrying out the work, which the employer had authorised.¹⁹⁸ The court held that on the facts, the question must be answered in the affirmative. After all, the court reasoned, the sexual abuse was 'inextricably interwoven' with the carrying out by the warden of his duties in Axeholme House.¹⁹⁹

The court considered the second leg of the Salmond test of whether the conduct was an 'unauthorised way of carrying out the employee's duties authorised by the employer'. The court concluded that this was a narrow application to sexual assault cases and held that the correct approach is for the courts to consider if there was a connection between the act in question and the employment. If a connection exists, then the closeness of that connection has to be considered in determining whether the wrongful act was committed in the scope of employment. It is submitted that this means that vicarious liability for intentional wrongdoing can arise if sexual harassment arose directly out of circumstances closely connected to the scope of employment. The court noted that the Salmond test does not cope ideally with intentional wrongdoing.²⁰⁰

The court rejected the narrow approach of simply holding that sexual assault is not part of the perpetrator's job description. It is submitted that the

¹⁹⁵ Supra (n6).

¹⁹⁶ Supra (n159).

¹⁹⁷ Supra (n60) at para 28.

¹⁹⁸ Supra (n60) at para 37.

¹⁹⁹ Supra (n60) at para 28.

²⁰⁰ Supra (n60) at para 16.

same applies with sexual harassment in that it is absurd to dissect the employee's duties into what was ordered and forbidden within the scope of employment. The court held that the correct approach is to look at the nature of employment on the basis that the employer undertook to care for the plaintiff through the services of the warden. The court found that there was a sufficiently close nexus between the torts of the warden and his employment because the torts were committed in the time and on the premises of the employers whilst the warden was busy executing his duties of caring for the plaintiff.²⁰¹ It is suggested that the strong connection was that the tort coincided with the carrying out of a supervisory role as a warden at a time and place he was in charge of the plaintiff and responsible for his welfare.

The court further held that the close connection formulation for vicarious liability:

...would have the advantage of dispensing with the awkward reference to the 'improper modes' of carrying out the employee's duties; and by focusing attention on the connection between the employee's duties and his wrongdoing it would accord with the underlying rationale of the doctrine and be applicable without straining the language to accommodate cases of intentional wrongdoing.²⁰²

The court dispensed of the rigid application of vicarious liability and held that the Salmond test is not a 'statutory definition of the circumstances which give rise to liability, but a guide to the principled application of the law to diverse factual situations'.²⁰³ The court thus stressed an important policy dimension in its application of the principle of vicarious liability.

The warden discharged that duty in an improper way, which was an abuse of his position, and the court held that 'an abnegation of his duty does not sever the connection with his employment'.²⁰⁴ This feature is a development of *Trotman*²⁰⁵ where the court held that sexual assault was a

²⁰¹ Supra (n60) at para 20.

²⁰² Supra (n60) at para 69.

²⁰³ Supra (n60) at para 70. This view is consistent with *Bazley* supra (n6), where the court held that the principle of vicarious liability is based on policy grounds and is not a 'deduction from legalistic premises.'

²⁰⁴ Supra (n60) at para 50.

²⁰⁵ Supra (n180).

negation of duty of care but did not use that fact to ground a connection between the tort and the employment. It is submitted that mismanagement of duties does not break the nexus between the employment and the wrongful conduct. It is suggested that the dominant and influential position of the harasser in the organization and his position of seniority and trust vis-à-vis the plaintiff, actually aids him in mismanaging his duties to commit sexual harassment.

The court further developed the frolic of one's own reasoning which was used in *Trotman*²⁰⁶ to exclude employer liability and held:

...the motive of the employee and the fact that he is doing something expressly forbidden and is serving only his own ends does not negative the vicarious liability for his breach of the 'delegated' duty.²⁰⁷

It is argued that this means that in English law the subjective element that enquires into the state of mind of the perpetrator, is irrelevant to a test of vicarious liability. This reasoning is more compatible with the essence of vicarious liability since it is a no-fault liability. This is contrary to *Bezuidenhout NO v Eskom*²⁰⁸ where the subjective element was a central issue, which led the court to conclude that the conduct of the driver, fell beyond the scope of his employment because subjectively the driver knew that he was prohibited from giving lifts to the public.

7.7 Critique of the South African law on vicarious liability in the workplace: sexual harassment cases in the light of foreign precedent

It was as if women...saw a solid wall when they looked for a way out of the sexual harassment dilemma. The feminist ferment of the 1970s suggested that there ought to be something that could be done about sexual harassment. Kitty's work identified where women might look for a handle. We looked, we found it, we pushed and kicked at it, and a door opened. As soon as it did, everyone looked at it and thought,

²⁰⁶ *Ibid.*

²⁰⁷ *Supra* (n60) at para 55.

²⁰⁸ *Supra* (n55).

“Oh, that’s a door, not a wall”, and began walking through it – as they have continued to do ever since.²⁰⁹

The above extract is true in the South African context because law on sexual harassment has recently seen the light of the day through the courts’ initiative in developing *common-law* to accord with the Constitution thereby giving hope and protection to the victims of sexual harassment.²¹⁰ The remedies for sexual harassment are an important feature of this thesis in that victims have not reached a dead-end when faced with sexual harassment. This chapter will discuss how the remedies for sexual harassment broadened by the courts to respond to sexual harassment in the workplace. These remedies provide a door to freedom and equal participation in the economy for women. The analysis of judicial precedents in South African will highlight that the silence on sexual harassment can be broken through legal intervention and redress.

7.7.1 *Grobler v Naspers Bpk en ’n ander*²¹¹

The problem with the traditional test of vicarious liability is that the courts have battled to develop consistent rules on what amounts to scope of employment. This was exacerbated by the perception that sexual harassment is not within the scope of employment but an independent act, which does not serve the master even though it occurs in the course of employment. *Bazley v Curry* has established that ‘the doctrine of vicarious liability rests on policy considerations and not on legalistic principles’.²¹²

*Bazley*²¹³ reiterated that a court should determine whether there are precedents, which unambiguously determine on which side of the line between vicarious liability and no liability the case falls. If prior cases are

²⁰⁹ AE Simon ‘Alexander v Yale University: An Informal History’ in MacKinnon and Siegel *op cit* (n88) 56.

²¹⁰ See ss 173 and 39(2) Constitution.

²¹¹ [2004] 2 All SA 160 (C).

²¹² *Supra* (n6) at para 26.

²¹³ *Supra* (n6) at para 15.

inconclusive and do not clearly suggest a solution, the court held that the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales behind strict liability.²¹⁴ It is submitted that this Canadian precedent laid foundation for the development of vicarious liability of employers for sexual harassment, on constitutional and policy grounds, in the High Court case of *Grobler*.²¹⁵

Judge Nel sought guidance from the Constitution and held that it enjoined the court to embark on judicial creativity and develop *common-law* to give effect to the Bill of Rights.²¹⁶ On the facts of this case, the first defendant had employed the second defendant as a trainee manager, thus placing him in a position of authority over the plaintiff. This created a risk inherent in the enterprise and made it possible for him to abuse his position to intimidate the plaintiff and other employees in an attempt to gain sexual favours. This conclusion satisfies the causal (as well as the risk) element in *Bazley*.²¹⁷ The special relationship between Samuels and Grobler materially aided him to commit sexual harassment thereby creating a sufficiently close link between the employment and the wrongful conduct. It is therefore clear that it is on the principle of conferring the supervisor with power to oversee the employees that creates an opportunity for the supervisor to abuse his power.

Judge Nel used the Constitution to protect and uphold the dignity women and their right to freedom and bodily security, and the women's right to physical and psychological integrity.²¹⁸ Judge Nel thus concluded that the *common-law* rules of vicarious liability must be adapted to give effect to the aforementioned constitutional rights and consequently held Naspers vicariously liable for sexual harassment. Judge Nel quoted with approval the judgment of Judge Souter in a much-celebrated American case of *Faragher v*

²¹⁴ *Ibid.*

²¹⁵ *Supra* (n211).

²¹⁶ S 39(2) Constitution.

²¹⁷ *Supra* (n6).

²¹⁸ S 12 Constitution.

*City of Raton*²¹⁹ that developed the law of sexual harassment in the United States:

Older cases, for example, treated smoking by an employee during working hours as an act outside the scope of employment, but more recently courts have generally held smoking on the job to fall within the scope... It is not that employers formerly did not authorize smoking but have now begun to do so, or that employees previously smoked for their own purposes but now do so to serve the employer. We simply understand smoking differently now and have revised the old judgments about what ought to be done about it.²²⁰

It is submitted that smoking is different from sexual harassment. Smoking during office hours can be said to be an act within the scope of employment because an act of smoking may serve to boost the morale of the worker, to alleviate stress and helps the worker relax thus enabling the worker to better serve the employer.²²¹ There is a close nexus between the agent's conduct and serving the employer. Smoking is a permitted leisure at work and it benefits the employer in that the employer reaps the benefits in the service of a productive relaxed worker. It is argued that sexual harassment on the other hand, falls short of serving the employer in that it is not an act which progresses towards serving the employer and 'the general rule is that sexual harassment by a supervisor is not conduct within the scope of employment'.²²² Sexual harassment is rather an act whereby an employee deviates from the purpose of serving the employer but may be within the scope of employment.

It is submitted that as much as the employer benefits in work well done by a smoking employee, the employer must face liability for the work not done by a harassing employee.²²³ It is suggested that an employee who

²¹⁹ *Supra* (n82) at 797.

²²⁰ *Supra* (n211) at 217.

²²¹ See *Rodgers v Kemper Construction Co* 50 Cal App 3d 608, 124 Cal Rptr 143 (1975). The court noted that where social or recreational pursuits on the employer's premises after hours are endorsed by the employer and are conceivably of some benefit to the employer or, even in the absence of proof of benefit, if such activities have become a customary incident of the employment relationship, an employee engaged in such pursuits after hours is still acting within the scope of his employment.

²²² *Ellerth supra* (n82) at 744.

²²³ In *Taber v Maine* 67 F 3d 1029 (2d Cir 1995) the court held that drinking by service members was an important to military morale, just as drinking was apparently instrumental to good

engages in sexually harassing conduct is neglecting to perform his master's work properly and is deviating from the instructions of the employer.²²⁴ It is suggested that sexual harassment is causally linked to the execution of duties because the harassing employee thereby breaches his delegated authority in committing sexual harassment.

Judge Nel embarked on a creative judicial process and developed South African law on sexual harassment in line with developments in *common-law* jurisdictions to the extent that vicarious liability of employer was upheld to protect the victims of sexual harassment. In so doing he invoked the powers conferred on him in terms of section 173 of the Constitution which:

...vests the inherent power in the Constitutional Court, Supreme Court of Appeal and High Courts to protect and regulate their own process, and to develop the *common-law*, taking into account the interests of justice.

The court stated that the issue was whether the law should regard sexual harassment by an employee as falling within the risks, which employers should assume by conducting business. The court held that the employer was vicariously liable for the conduct of its supervisor. The court thus did not find it necessary to explore the 'scope of employment' test to found liability on the employer. Instead, the court applied the enterprise risk approach as a new test for establishing vicarious liability on the employer, which was adopted in *Bazley*.²²⁵ The enterprise-risk principle adopted by Judge Nel was developed in *Bazley*²²⁶ by McLachlin J, who identified that the opportunity that the enterprise afforded the employee to abuse his or her power was a factor of pivotal importance.

The 'scope of employment' and 'enterprise risk' tests are interrelated yet mutually exclusive – in that both tests seek to achieve the same desired

employee morale and customer relations. In the context of the military mission, the court held that an occasional drunken service member who leaves government premises and causes damage is a completely foreseeable event, in the sense that it is a reasonably obvious risk of the general enterprise. The court concluded that it did not think that it would be either unfair or the slightest bit unreasonable to impose that cost on the government.

²²⁴ See NK (CC) supra (n7) at para 47.

²²⁵ Supra (n6).

²²⁶ *Ibid.*

end of establishing vicarious liability on the part of the employer. An enterprise risk is an adaptation of the scope of employment test in that the courts look at the 'enterprise risk' to establish the scope of employment. It has been highlighted in chapter seven that the traditional test of scope of employment did not cope well with intentional wrongdoing. However, that is not a reason to abandon the much-established *common-law* test of vicarious liability in the light of section 39(2) of the Constitution, which enjoins the court to develop *common-law* in harmony with the spirit, purport and objects of the Bill of Rights. Similarly, section 8(3) of the Constitution is an important provision, which mandates the court to develop common law in accordance with the Constitution.

It is proposed that the traditional 'scope of employment' test should be retained and not be replaced by the 'enterprise risk' test. Risk' is only relevant as a *factor* to be taken into account, which helps establish that the employment causally contributed to the commission of the wrong, and not as the ultimate test of vicarious liability for sexual harassment in the workplace. It is argued that the 'scope of employment' test helps acknowledge sexual harassment as a workplace event, which is not a private matter, thereby warranting legal and employer intervention. It is highlighted that after all, vicarious liability is a policy based principle, which is not a hard and fast rule – in that the courts have more recently adapted it to be consistent with the Constitution and *common-law* jurisdictions.²²⁷

It is argued that not every employer who confers power on a supervisor is liable for *any* conduct on the part of the supervisor. Under *common-law* vicarious liability, employer liability is limited by the causation element, which requires that the employment must materially aid the employee to commit the wrong, in the sense of substantially contributing to it, before it is just to impose strict liability. In other words, there must be a sufficiently close nexus between the employment and the wrong before

²²⁷ See NK (CC) *supra* (n7).

vicarious liability can ensue.²²⁸ Similarly, section 60 of the EEA does not impose an open-ended employer liability but is limited to the extent to which the employer failed to act against gender discrimination once it was brought to its attention, in which case the perpetrator's commission of gender discrimination, will be inferred to the employer.

It may be that the plaintiff did not make use of the opportunity to report gender discrimination to the employer as required by section 60(1) of the EEA. The employer can thus not be automatically vicariously liable under section 60(3) of the EEA where gender discrimination was not reported to it and was thereby not given an opportunity to prevent and remedy sexual harassment. The affirmative defence in section 60(4) further insulates the employer from *statutory* vicarious liability where it did all that was reasonably practicable to eliminate gender discrimination. After all, if the employer had acted diligently, the allegation of gender discrimination would not have been brought before the court.

Le Roux accepts the outcome of *Grobler (C)*²²⁹ with reservations. She asks 'whether there was no scope for the court to conclude that Naspers was directly, instead of vicariously liable for failing to address Grobler's concerns at a much earlier stage'.²³⁰ It is established that the remedies are not mutually exclusive and there was obviously scope to argue personal liability based on the employer's non-delegable duty to ensure a safe environment. The court could only decide on personal liability if this was pleaded. This is evident in *Media 24 Limited, Gasant Samuels v Sonja Grobler*²³¹ where breach of delictual duties was pleaded and the court found the employer personally liable for negligent breach of delictual duty to create and maintain a safe

²²⁸ *Ibid.*

²²⁹ *Supra* (n211).

²³⁰ R le Roux 'Sexual Harassment in the Workplace: Reflecting on *Grobler v Naspers*' (2004) 25 *ILJ* 1897 at 1902.

²³¹ *Supra* (n157).

working environment, and a duty to protect employees from psychological harm caused by sexual harassment.

Le Roux further asserts that in terms of *Grobler (C)*,²³² 'vicarious liability will not be imposed where sexual harassment occurs in a low or no risk or equal relationship'.²³³ It is submitted that on risk, *Grobler (C)*²³⁴ never distinguished between degrees of risk - a risk is always present in the employer-employee relationship and in the running of an enterprise. There is risk of abuse or misuse of authority by those in powerful positions and sexual harassment is an inherent risk in human interactions in the workplace. It is for this reason that an employer is under duty to take reasonable steps to create and maintain a working environment in which sexual harassment is unacceptable.²³⁵ The risk of sexual harassment is also present between co-workers not just between supervisor and a subordinate employee. Furthermore, there is a risk of a hostile environment ensuing between co-workers if the risk of sexual harassment is not managed properly.

It is worth noting that 'risk' was not applied in vacuum in *Grobler (C)*²³⁶ but the High Court took into account the following instructive policy considerations which will inform the law on sexual harassment in South Africa:

- (a) Developments in sexual harassment law in other *common-law* jurisdictions;
- (b) Opportunity presented by the enterprise to the harasser to abuse his authority;

²³² *Supra* (n211).

²³³ Le Roux *op cit* (n230) 1902-3.

²³⁴ *Supra* (n211).

²³⁵ Item 6(2) 2005 Code.

²³⁶ *Supra* (n211).

- (c) Nature of trust relationship between the harasser and the plaintiff which enhanced the risk of the commission of the wrongful conduct;
- (d) Vulnerability of the plaintiff to abuse of supervisory authority;
- (e) Sufficient connection between the wrongful conduct and the conduct authorised by the master;
- (f) The resultant tangible employment action suffered by the plaintiff;
- (g) The resultant post-traumatic stress disorder suffered by the plaintiff;
- (h) Rights violated by sexual harassment; and
- (i) Mandate in terms of the Constitution to develop *common-law* to promote the spirit of the Bill of Rights and to adapt the rules of vicarious liability to protect the dignity, freedom, security, and right of physical and psychological integrity of women in the workplace.

Le Roux states that 'there is room to argue that employment relationships fall within the sphere of employment and that sexual harassment, albeit prohibited, still deals with conduct within the sphere of employment'.²³⁷ She further states that 'it may well be argued that following this (traditional) approach means that there is very little that the employer can do to avoid liability in the case of sexual harassment'.²³⁸ It is submitted that finding sexual harassment to be within the sphere of employment may impose an excessive burden on the employers. However, this risk is mitigated by the fact that sexual harassment is an endemic problem which is foreseen unlike an act of God or an act of State in that the employer can mitigate its effects by taking pro-active steps. A diligent employer will be immune from liability if it can prove that it took all the reasonable and practicable steps to prevent sexual

²³⁷ Le Roux *op cit* (n230) 1905.

²³⁸ *Ibid.*

harassment and educate the staff members if the claim is under labour law provisions. If the claim is in delict, the only relevance of the reasonable steps taken by the employer would seem to be to exclude fault – negligence or intention.

Whitcher²³⁹ supports the risk theory enunciated in *Grobler (C)*²⁴⁰ and rightly asserts ‘the shifting of this sort of risk to the employer rather than expecting an innocent third party to bear the damages caused by sexual harassment is thus justifiable and fair’. She further asserts that even if the ‘strict supervisor test’²⁴¹ were not to be applied, Naspers would still have been vicariously liable because the working relationship created the risk of harassment and there was a sufficiently close connection between the wrongful acts and the job Samuels was authorised to perform.²⁴² Supervisory harassment always involves an element of *quid pro quo* in that victimisation or favouritism will ensue depending on compliance/non-compliance with the sexual demands. Furthermore, supervisory harassment is inimical to gender equality in the workplace and aggravates wrongfulness of the conduct because of the supervisor’s power to discriminate on the employment benefits.

Whitcher further opines that the victim of sexual harassment has optional remedies and nothing could have prevented Ntsabo from pursuing a civil route like the one Grobler did, provided ‘the applicant is not seeking relief flowing from either the LRA or the EEA’.²⁴³ Whitcher favours the labour law remedy and asserts that

The Labour Court is probably the safest route because there are clearly defined statutory provisions (and now case law) which, if violated, establish an essentially

²³⁹ B Whitcher ‘Two Roads to an Employer’s Vicarious Liability for Sexual Harassment: S *Grobler v Naspers Bpk en ‘n Ander* and *Ntsabo v Real Security CC*’ (2004) 25 ILJ 1907 at 1914.

²⁴⁰ *Supra* (n211).

²⁴¹ In the United States, the strict supervisor test was established when the Supreme Court held in *Ellerth supra* (n82) and *Faragher supra* (n82) that an employer is strictly liable for sexual harassment by a supervisor that culminates in a tangible employment detriment, such as a raises, discharge, demotion or undesirable assignment.

²⁴² Whitcher *op cit* (n239) 1919.

²⁴³ Whitcher *op cit* (n239) 1923.

subjective 'close connection' between the risk the company created and the wrongful act.²⁴⁴

The labour law remedy is favourable for further reasons that sentimental loss can be claimed under section 50(2)(b) of the EEA, and *statutory* vicarious liability contained in section 60 of the EEA is not burdensome to establish compared to the *common-law* test for vicarious liability.²⁴⁵

Calitz supports the outcome in the High Court case of *Grobler*²⁴⁶ and advocates a 'new test' of vicarious liability based on the 'enterprise risk' as 'the basis for holding employer vicariously liable'.²⁴⁷ Calitz suggests that to ground vicarious liability, 'harm must in general be foreseeable, and there must be a close nexus between the acts of the employee and the risk created by the enterprise'.²⁴⁸ It is argued that the problem with this reasoning is that Calitz imports foreseeability, which is a form of fault, into the picture. It is an established principle that fault on the part of the employer is not required for *common-law* vicarious liability. Calitz appears to be suggesting a type of negligence inquiry, which would not cover sentimental loss under the *actio iniuriarum* where intention is required.

Judge Nel in *Grobler* (C)²⁴⁹ developed and revived the law on sexual harassment and gave it a new dimension since the traditional test of scope of employment was too restrictive and left the victims of sexual harassment unable to invoke vicarious liability on the part of the employer. Judge Nel gave new meaning to what was stated by Barlow:

The customs and beliefs or needs of a primitive time established a rule or formula. In the course of centuries the custom belief or necessity disappears but the rule remains. The reason, which gave rise to the rule, has been forgotten and ingenious minds set themselves to enquire how it is to be accounted for. Some ground of policy is thought of then the rule adapts itself to the new reasons, which have been found for it, and

²⁴⁴ *Ibid.*

²⁴⁵ See ch 6.2 on the discussion of the remedy of *statutory* vicarious liability in terms of section 60 of the EEA and damages under the section 50 of the EEA.

²⁴⁶ *Supra* (n211).

²⁴⁷ K Calitz 'Vicarious Liability of Employers: Reconsidering Risk as a Basis for Liability' (2005) 2 *TSAR* 215 at 232.

²⁴⁸ Calitz *op cit* (n247) 234.

²⁴⁹ *Supra* (n211).

enters on a new career. The old form receives a new content and in time even the form modifies itself to fit the meaning which it has received.²⁵⁰

7.7.2 *Media 24 Limited, Gasant Samuels v Sonja Grobler*²⁵¹

The employer's duty to provide and maintain a working environment that is free from hazards to health and safety of employees can be found in section 8(1) of the Occupational Health and Safety Act.²⁵² The Supreme Court of Appeal developed this statutory duty in *Grobler* and held that the employer owes a *common-law* duty to its employees, as opposed to a moral obligation:

- (a) 'to protect them from physical harm caused by what may be called physical hazards,' and
- (b) 'to protect them from psychological harm caused, for example, by sexual harassment by co-employees.'²⁵³

The court did not explore the principle of vicarious liability but instead decided the case on a negligent breach by employer of its personal duty to maintain a working environment free from sexual harassment. The court extended the employer's duty to provide a safe working environment to cover the duty to protect the psychological welfare of the employee. This gave effect to the constitutional right to psychological integrity, which is violated by sexual harassment.²⁵⁴ It is submitted that the protection of the psychological welfare of the employee is relevant in the light of the psychological trauma suffered by the victim of sexual harassment.

The court held that the legal convictions of the community require an employer to take reasonable and practicable steps to prevent sexual harassment of its employees in the workplace. The employer is also under an obligation to compensate the victim for harm caused thereby should it

²⁵⁰ TB Barlow *The South African Law of Vicarious Liability* (1939) at 9.

²⁵¹ *Supra* (n157).

²⁵² Act 85 of 1993.

²⁵³ *Supra* (n157) at para 65.

²⁵⁴ S 12(2) Constitution.

negligently fail to do so.²⁵⁵ The court thus established that the employer is under a general delictual duty, which does not have to stem from the contract of employment or from the statute but stems from the legal convictions of the community.²⁵⁶ It has thus been established that the basis of the employer's duty to prevent and remedy sexual harassment arises out of the contract of employment, corporate governance, the *common-law* duty of care, a statutory remedy, and the legal convictions of the community.

Farlam JA held that 'the respondent's alleged refusal to lay a charge or even make use of the grievance procedure against the second appellant precluded Tydskrifte from preventing her from being harassed'.²⁵⁷ This distinguishes *common-law* from labour law in that 'the reluctance of a harassed employee to take formal steps does not absolve the employer from its duty to provide a safe working environment'²⁵⁸ in terms of *common-law*. In labour law:

[I]f a complainant is not willing to follow any procedures (not even the informal procedure) available in terms of the effectively communicated policy consistent with the 2005 Code, the employer might well escape liability in terms of the EEA.²⁵⁹

It is submitted that the employer cannot evade responsibility for the harm that ensues from sexual harassment because of personal negligence that follows on failure to guard the workplace against the risk of sexual harassment. It is thus advisable for employers, since it is clear that they play a key role in eliminating unfair discrimination in the workplace, to act and take reasonable and practicable steps to rid the workplace of sexual harassment practices.

Farlam JA held that the manager's (Van As) failure to act and deal with sexual harassment when it was reported to him by Grobler was 'culpable'²⁶⁰ and 'his employer, was clearly vicariously liable for his failure to act in this

²⁵⁵ Supra (n157) at para 68.

²⁵⁶ Supra (n157) at para 70.

²⁵⁷ Supra (n157) at para 71.

²⁵⁸ R le Roux 'Sexual Harassment in the Workplace: A Matter of More Questions than Answers or Do We Simply Know Less the More We Find Out?' 2006 (10) *Law, Democracy and Development* 49 at 62.

²⁵⁹ *Ibid.*

²⁶⁰ *Ibid.*

regard'²⁶¹ (as opposed to Samuel's wrongful conduct of sexual harassment).

Le Roux opines that this reasoning 'is rather strained':

The employer is held liable in terms of its duty to provide a safe working environment for something that did not happen in the workplace at all on the assumption that the perpetrator would have responded in a certain fashion has the employer reprimanded him for his conduct in the workplace.²⁶²

It is submitted that the court's reasoning is similar to section 60 of the EEA where the employer is held vicariously liable for failure to act once the alleged wrongful conduct has come to its attention. Perhaps the court correctly felt that had the employer taken remedial steps when sexual harassment came to its attention, sexual harassment would not have persisted. The significance of this finding is that the employer cannot be passive and expect gender discrimination to remedy itself without its intervention in the light of its duty of care to provide a safe working environment that is free from harassment, discrimination, and violation of human rights. It must be noted that Farlam J 'left open' the question whether the employer was vicariously liable for the wrongful conduct of Samuels, the perpetrator.²⁶³

It is argued that the court in finding that the employer was both personally and vicariously liable is not a contradiction but is proof that remedies for sexual harassment are not mutually exclusive. It must be noted that the court's reasoning is consistent with the basis for *statutory* vicarious liability in terms of section 60(3) of the EEA in terms of which the employer is held vicariously liable for its culpable failure to remedy gender discrimination once it has come to its attention. In such a case, the perpetrator's gender discrimination will be deemed the employer's gender discrimination in terms of section 60(3) of the EEA.

It is suggested that the court in finding the employer personally liable, stresses the employer's non-delegable duty to prevent sexual harassment in

²⁶¹ *Ibid.*

²⁶² Le Roux *op cit* (n258) 54.

²⁶³ *Supra* (n157) at para 74.

the workplace and encourages employers to be pro-active in enforcing zero tolerance to gender discrimination in the workplace. Furthermore, if negligent breach of delictual duty is in issue, then damages for psychological harm would seem to be confined to pain and suffering and emotional shock. It must be noted that sentimental loss of a broader nature flowing from insult of dignity requires existence of intention as opposed to negligence. This marks the difference between a delictual remedy and a labour law remedy, which should be noted by the plaintiff when deciding which remedy to pursue.

The advantage with the labour law remedy is that fault – intention or negligence, is not a requirement in order to enable the court to award payment for damages for sentimental loss under section 50(2)(b) of the EEA. It is submitted that only a diligent employer will be exonerated from personal/vicarious liability if it can show that it took pro-active and reactive steps to prevent sexual harassment in the workplace and dealt with it as soon as it came to its attention.

7.7.3 *K v Minister of Safety and Security*²⁶⁴

So don't be discouraged by those who say the law of sexual harassment doesn't work. Dr. King told his followers that justice does not take long 'because truth crushed to earth will rise again.' He said it won't take long because the arc of the moral universe is long, but it bends toward justice.²⁶⁵

The abovementioned quotation holds true in the light of the Constitutional Court judgment of *K v Minister of Safety and Security*.²⁶⁶ It is submitted that the law plays a key role in protecting the status of women in the workplace and the judiciary, in its creative role helps protect and restore the women's dignity in the workplace. In this case, the appellant (K) was raped by three policemen on duty and in uniform, who had offered her a lift from a night shop. The

²⁶⁴ [2005] 3 All SA 519 (SCA).

²⁶⁵ PY Price 'Eradicating Sexual Harassment in Education' in MacKinnon and Siegel *op cit* (n88) 65.

²⁶⁶ *Supra* (n7).

appellant sued the employer for damages on grounds that the employer was vicariously liable for the criminal acts of the rapist policemen. The Supreme Court of Appeal dismissed the appellant's claim because deviation of the policemen from the course of employment was great that there was no justification upon which the court could find the employer vicariously liable.²⁶⁷

The court reasoned that on the facts, the three policemen were on the frolic of their own and their conduct was motivated by self-gratification and the deviation was of such magnitude that 'that it cannot be said that in committing the crime of rape they were in any way exercising those functions or performing those duties'.²⁶⁸ The Supreme Court of Appeal therefore narrowly applied the 'scope of employment', in total disregard of the following:

- a) K's violated rights;
- b) The policy considerations underlying the *common-law* vicarious liability; and
- c) The constitutional mandate in terms of section 39(2) of the Constitution which enjoins the court to develop *common-law* to promote the spirit, purport and objects of the Bill of Rights.

The court thus excluded a frolic of one's own, which on the facts of the case amounted to abuse, and mismanagement of policemen's duties whilst they were acting in the course and scope of employment. K appealed against the decision of the Supreme Court of Appeal to the Constitutional Court. She argued that the *common-law* test of vicarious liability be developed in terms of section 39(2) of the Constitution as the outcome did not accord with the spirit, purport and objects of the Bill of Rights. The Constitutional Court stressed this point and held that the question of the protection of K's 'rights to security

²⁶⁷ Supra (n264) at para 4-5.

²⁶⁸ Supra (n264) at para 5.

of the person, dignity, privacy and substantive equality are of profound constitutional importance'.²⁶⁹

The court then went on enquire whether the police conduct was sufficiently close to their employer's business to render it vicariously liable. In answering this question, the court took into account several factors to establish the close nexus between the rape and the employment. The court held that the three policemen's work and constitutional obligations were to ensure protection, safety and security of all South Africans and to prevent crime.²⁷⁰ These obligations are a creature of statute as contained in the Police Act²⁷¹ and the Constitution.²⁷²

In addition to their constitutional and statutory duties to protect the public, the police had offered to assist K by giving her a lift home and she had accepted their offer in good faith. She placed her trust in the policemen by virtue of their capacity and police mandate.²⁷³ On the facts, the policemen wore uniform so as to make them more identifiable to the members of the public who were in need of assistance. The police were thus doing what was demanded by their employment when they came to K's assistance. It is submitted that by raping K, the policemen not only violated K's trust but also violated the public trust and eroded the community's confidence in the police integrity.

The court²⁷⁴ adopted a two-leg test comprising of the subjective and objective element, which was applied and developed in *Rabie*.²⁷⁵ It is

²⁶⁹ NK (CC) supra (n7) at para 18.

²⁷⁰ Supra (n7) at para 51.

²⁷¹ The preamble to the South African Police Service Act 68 of 1995 provides that: whereas there is a need to provide a police service throughout the national territory to - ensure the safety and security of all persons and property in the national territory; reflect respect for victims of crime and an understanding of their needs...

²⁷² S 205(3) of the Constitution provides that:

The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.

²⁷³ Supra (n7) at para 51.

²⁷⁴ Supra (n7) at para 44.

submitted that both elements have to be satisfied. The subjective element enquires on the state of mind of the three policemen at the time of the commission of the offence whether they acted with the intention to serve the master. The objective element enquires whether on the facts there is a sufficiently close link between the three policemen acts for their personal interests and the business of the employer. In answering this question, the court held that it should consider the need to give effect to the spirit, purport and objects of the Bill of Rights.²⁷⁶

It is submitted that subjectively, the three policemen clearly intended to serve their sexual gratification and sexual desires. They exerted their power over the victim by exploiting the position of trust to their advantage. The policemen were clearly in deviation of their duties and did not intend to serve their master in committing the rape. However, the enquiry does not end there. One has to satisfy the objective element, which asks whether there was a sufficiently close connection between the delict and the business of the employer.

It is argued that the subjective element must not be viewed narrowly to only look at whether the policemen intended to serve the master. It is suggested that it would be enough to infer on the facts that they intended to use their status as policemen to create the opportunity to commit the rape. Viewed narrowly, the subjective element would serve to exclude vicarious liability because it would be open to the employer to argue that the employee was on a frolic of his own thereby severing the close link between the employment and the wrongful conduct.

The court correctly noted that the issue of commission and omission are both relevant in determining vicarious liability in as much as they are relevant in determining wrongfulness in a particular case.²⁷⁷ The court thus

²⁷⁵ *Rabie supra* (n51) at 134C-E.

²⁷⁶ *Supra* (n7) at para 44.

²⁷⁷ *Supra* (n7) at para 49.

held that the three policemen when committing the rape were simultaneously omitting to perform properly their constitutional and statutory duties as policemen which they owed to the K.²⁷⁸ In committing the brutal crime of rape, the court held that the policemen not only failed to protect K, but they also infringed on her rights to dignity and security of the person.²⁷⁹ The crime of rape was thus a mismanagement of police duties. It was committed within the scope of employment at a time and place when the policemen were on duty in their capacity as the law enforcement agents and agents of the master, and this created a close nexus between the rape and the employment. The police had not abandoned the scope of employment but merely deviated from the instructions of the master within the sphere of employment.

The court weighed up the totality of the factors and circumstances and concluded that there was indeed an intimate connection between the delict committed by the three policemen and the purposes of their employer.²⁸⁰ It is this close nexus between the employment and the rape, which led the Constitutional Court to conclude that the respondent was vicariously liable for the wrongful conduct of the policemen. It is argued that a finding of vicarious liability was a fair and just conclusion because by clothing policemen with power over K, the state materially enhanced a risk of abuse or misuse of such power. The extent of policemen's power over the victim was profound, and the vulnerability of the victim to the wrongful exercise of policemen's power made them an object of danger to the victim, the very person they were engaged to protect.²⁸¹ The presence of this risk provided a strong link between the police's employment and the rape that ensued which was sufficient to ground vicarious liability on the part of the employer.

²⁷⁸ Supra (n7) at para 48.

²⁷⁹ Supra (n7) at para 57.

²⁸⁰ *Ibid.*

²⁸¹ These are factors which the court considered in *Bazley* supra (n6) at para 41, to establish a link between the enhancement of risk and the wrongful conduct that accrues therefrom.

The outcome of *NK (CC)*²⁸² is consistent with the Supreme Court of California judgment in *Mary M v City of Los Angeles*²⁸³ where a police officer, in uniform, stopped the plaintiff for erratic driving. Instead of taking her to the police station, he offered a lift to her house and raped her. The court held that the police officers are granted great power and control which includes power to detain persons at gunpoint, place them in handcuffs, remove them from their residences, order them into police cars, frisking them and in some circumstances, use deadly force.²⁸⁴

The court found that 'in view of the considerable power and authority that police officers possess, it is neither startling nor unexpected that on occasion an officer will misuse that authority by engaging in assaultive conduct'.²⁸⁵ The court concluded that in carrying out these important responsibilities, the police act with the authority of the state and when police officers on duty misuse that formidable power to commit sexual assaults, the employer must be held accountable for their actions.²⁸⁶

Sexual harassment might not be part of the job description but it can form part of the scope of employment when all the factors point to a close nexus between the wrongful conduct and employment. The Constitutional Court in *NK* took an opportunity to develop the *common-law* principle of vicarious liability especially the 'scope of employment' requirement, to accord with the purport, objects and spirit of the Constitution.²⁸⁷ It is argued that a strict application of vicarious liability in vacuum without reference to the Constitution, development in *common-law* jurisdictions and policy considerations, would have meant K's constitutional rights merely existed in letter and not in spirit. The Constitutional Court thus developed *common-law* in a way, which vindicated K's constitutional rights.

²⁸² *Supra* (n7).

²⁸³ 814 P 2d 1341 (1991).

²⁸⁴ *Supra* (n283) at 1350.

²⁸⁵ *Ibid.*

²⁸⁶ *Supra* (n283) at 1352.

²⁸⁷ *Supra* (n7).

It is thus important that in applying the objective element of the test of vicarious liability, all relevant factors which include *ubuntu*, the Constitution and the legal convictions of the community must be taken into account. O'Regan J in *NK (CC)*²⁸⁸ relied on Canadian and English authorities²⁸⁹ and followed suit in developing the concept of frolic of one's own to cover negation of duty, which includes mismanagement of duties, and focused on the sufficiently close nexus between the wrongful conduct and the employment. It is submitted that mismanagement of duties, abuse of trust and power are the quintessence of the harm of sexual harassment in the workplace. The *common-law* test of vicarious liability developed in *NK (CC)*²⁹⁰ is thus in harmony with the Canadian and English jurisprudence.

7.8 Miscellaneous remedies

In sexual harassment cases, the court may explore further alternative relief in terms of section 7 of the Domestic Violence Act and issue a protection order, which restrains the harasser:

- a) from committing an act of sexual harassment;
- b) from communicating with the complainant;
- c) from touching the plaintiff; and
- d) from posing a threat to the plaintiff's safety and security at work.

Rubenstein rightly asserts that since sexual harassment 'may amount to a breach of contract, an action in the ordinary courts for a prohibitory injunction restraining future breaches might be worth considering'.²⁹¹

²⁸⁸ *Ibid.*

²⁸⁹ *Bazley supra* (n6), *Jacobi supra* (n159) and *Lister supra* (n60).

²⁹⁰ *Supra* (n7).

²⁹¹ M Rubenstein 'The Law of Sexual Harassment at Work' (1983) 12 *ILJ* 1 at 9.

Guidance can be found in section 5 of the Domestic Violence Act,²⁹² which gives the court power to issue an interim protection order against the respondent if there is *prima facie* evidence that the respondent is committing or has committed an act of domestic violence and undue hardship may be suffered by the complainant if the order is not issued.

An interdict will thus be an alternative remedy to deter future acts of sexual harassment where there is no constructive dismissal on the part of the plaintiff and the perpetrator is not dismissed or relocated. Furthermore, an interdict has an effect of building Chinese walls between the plaintiff and the perpetrator, and restrains the perpetrator from further polluting the work environment with sexual harassment.

7.9 Conclusion

This chapter has highlighted that the agency principle strictly applied is very narrow and employers would otherwise escape liability because sexual harassment would not be in the perpetrator's line of duty, mode of operation or within the scope of employment. The narrow approach to scope of employment is an example of a classic case cited by Barlow:

A servant may be forbidden to pursue a certain line of conduct in the master's office on the ground that it interferes with proper carrying on of the work, but if the forbidden act is one of a private nature it will not fall under the master's control. A clerk can be forbidden to flirt with the lady typist as it is against the interests of the master to allow such conduct on the part of his staff. However, if the clerk carries on a flirtation with the master's connivance, he cannot be held liable if the clerk kisses the typist, as his conduct with women is a matter over which the master cannot exert any control except to forbid it.²⁹³

The *NK (CC)* and *Grobler* cases²⁹⁴ must be applauded in giving a constitutional weight to the principle of vicarious liability to protect women. The outcome of *Grobler (C)*²⁹⁵ is of considerable importance for employers

²⁹² 116 of 1998.

²⁹³ Barlow *op cit* (250) 128.

²⁹⁴ *NK (CC)* *supra* (n7), *Grobler (C)* *supra* (n211) and *Grobler (SCA)* *supra* (n157).

²⁹⁵ *Supra* (n211).

because it affirms the 'dim view our courts generally take of sexual harassment in the workplace and the employer who do not take the necessary steps to prevent or eliminate sexual harassment'.²⁹⁶ It is the first time that the High Court has found that sexual harassment does indeed form part of the scope of employment on the facts of the *Grobler* case.²⁹⁷ The High Court acknowledged the importance of enterprise risk approach in the context of sexual harassment whereby the employer's enterprise created and fostered the risk that ultimately led to the commission of the wrongful conduct.²⁹⁸ This is an important development of the law on sexual harassment in South Africa and is proof that the courts are willing to deliver the promise of equal protection before the law as enshrined in the Constitution.

The 2005 Code has also made an important development of the law on sexual harassment by describing sexual harassment as conduct, which violates the rights of employees enshrined in the Bill of Rights.²⁹⁹ The Constitutional Court in *NK*³⁰⁰ stressed the policy dimension of vicarious liability and spelt out the relevant factors in a way that could be adapted to provide guidance for developing the scope of vicarious liability in cases of sexual harassment in the workplace, which include a minimum of the following guidelines:

- a) The mandate of the courts in terms of sections 8(3), 39(2) and 173 of the Constitution;
- b) The constitutional rights violated as a result of sexual harassment;
- c) The special fiduciary relationship which enhances the harasser's ability to exploit the trust and confidence of the plaintiff;

²⁹⁶ C Mischke 'The Employer's Liability for Sexual Harassment - The High Court Makes New Law with Important Implications for Employers' (2004) 14 *Contemporary Labour Law* 5 at 10.

²⁹⁷ *Grobler* (C) *supra* (n211).

²⁹⁸ *Ibid.*

²⁹⁹ Item 4 2005 Code.

³⁰⁰ *Supra* (n7).

- d) The extent to which the mismanagement of duties constitutes an improper way of executing authorised tasks or omitting to do that which the perpetrator is authorised to do; and
- e) Whether on the facts there is a sufficiently close link between the misuse of power and the employment.

The South African, Canadian and English authorities have enhanced the principle of vicarious liability to stress a sufficiently strong link between the employment and the wrongful conduct – a nexus so strong that it would pass the limitation clause test in section 36 of the Constitution. In those instances (sufficiently strong link) it would be just and equitable to hold the employer vicariously liable in an open and democratic society. It has been established that the United States law on sexual harassment is well developed and the supervisor-approach to vicarious liability developed in *quid pro quo* cases attends to the core of sexual harassment in the workplace. Supervisory harassment is evidence that too much power leads to corruption of such power. The reality is that the supervisor is on a pedestal in the workplace and often uses his dominant organizational position to harass his subordinates because his comfort is that the fate of the plaintiff's career progress is in his hands.³⁰¹

The Canadian approach in *Bazley* and *Jacobi*³⁰² (close link between the wrongful conduct of the employee and the nature of employment) was regarded in *NK (CC)*³⁰³ as compatible with the approach adopted in *Rabie*³⁰⁴ – that is to say, 'sufficiently close link' (and not the enterprise risk approach) in *Rabie*. The development of sexual harassment law in Canada from the traditional 'scope of employment' test which served to exclude sexual

³⁰¹ See *Ntsabo* supra (n61) and *Grobler (C)* supra (n211) which involved supervisory harassment.

³⁰² *Bazley* supra (n6) and *Jacobi* supra (n159).

³⁰³ *Supra* (n7) at para 43-4.

³⁰⁴ *Supra* (n51).

harassment claims as being 'personal'³⁰⁵ has been similarly abandoned in South Africa in *Grobler (C)*.³⁰⁶ In South Africa, vicarious liability of employer has thus been expanded to take into account the context of the enterprise within which sexual harassment arises and making the employer accountable for the risks inherent in the running of that enterprise which enhances the probability of harm.³⁰⁷

In English law, *Lister*³⁰⁸ is an important authority for the fact that a negation of duty and doing the opposite of what the employee is ordered to do is still a breach of that duty and does not exclude vicarious liability. It is now established in English law that:

[I]f the act of the servant which gives rise to the servant's liability to the plaintiff amounted to a failure by the servant to perform that duty, the act comes within 'the scope of his employment' and the employer is vicariously liable.³⁰⁹

The South African courts in *NK (CC)*³¹⁰ and in *Grobler (C)*³¹¹ have followed suit in viewing mismanagement of duties as falling within the scope of employment and law on sexual harassment has thus been developed to be in line with the English law. It is emphasized that the negation of duty approach is instructive in the context of sexual harassment. *Lister*³¹² is instructive because sexual harassment often involves abuse of power and taking advantage of the special position that the perpetrator holds in relation to the plaintiff.

³⁰⁵ See *Barrett v The Ship 'Arcadia'* (1977) 76 DLR (3d) 535 (BCSC) where the court found that the defendant steamship company could not be held vicariously liable since the sexual assault on a passenger because the act was clearly separate and apart from, and unconnected with his employment as an passenger's steward. In a similar case, the Ontario Court of Appeal declined to impose vicarious liability in a sexual harassment case of *Q v Minto Management Ltd* (1986) 34 DLR (4th) 767 (Ont CA) where a tenant was raped in her apartment by the landlord's employee. The employee had access through his employment to the master keys for the apartment building. The court dismissed the claim for vicarious liability against the landlord for the sexual assault because it viewed the act of the employee as an independent personal act that was insufficiently related to the scope of employment.

³⁰⁶ *Supra* (n211).

³⁰⁷ *Ibid.*

³⁰⁸ *Supra* (n60).

³⁰⁹ *Supra* (n60) at para 59.

³¹⁰ *Supra* (n7).

³¹¹ *Supra* (n212).

³¹² *Supra* (60).

The effect of the illuminating developments in South Africa, Canada, United States and United Kingdom on the law of sexual harassment in the workplace has encouraged the employers to be more pro-active in preventing and remedying sexual harassment in the workplace whilst offering broader legal redress for victims of sexual harassment. In the light of recent judicial precedents in South Africa, the principle of vicarious liability can no longer be rigidly applied whilst ignoring the constitutional mandate³¹³ and rationale behind vicarious liability.

³¹³ S 39(2) Constitution.

Chapter Eight - Jurisdiction

8.1 Outline

The aim of this chapter is to deal with jurisdictional issues facing the plaintiff in the case of sexual harassment who must therefore choose which court will entertain her case. This will also depend on whether the cause of action is based in delict or in labour law. The jurisdictional defence in terms of the Compensation for Occupational Injuries and Diseases Act¹ ('COIDA') which deals with the substitution of compensation for other legal remedies will be scrutinized and discussed.

8.2 The scope of the jurisdiction of the courts

Le Roux, Orleyn and Rycroft submit that 'if the cause of action is unfair discrimination, the EEA is the appropriate law under which to institute proceedings; if the cause of action is a delict, the *common-law* is the appropriate law, and the two are not in conflict'.² Unfair discrimination is unlawful conduct, which is also in violation of section 9 of the Bill of Rights. The action for unfair discrimination could be grounded in delict and brought before the High Court, and not the Labour Court. In some matters, there is an overlap and the Labour Court has concurrent jurisdiction with the High Court, and not mere absence of conflict.³

Remedies under the LRA for unfair labour practice 'are not exhaustive of the remedies that might be available to employees in the course of the employment relationship' since sexual harassment can 'constitute both an "unfair labour practice" (against which the Act provides a specific remedy)

¹ 130 of 1993.

² R le Roux, T Orleyn and A Rycroft *Sexual Harassment in the Workplace: Law, Policies and Processes* (2005) at 77.

³ S 157(2) LRA. *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at para 3.

and it also might give rise to other rights of action.⁴ O'Regan J correctly held in *Fredericks v MEC for Education and Training, Eastern Cape*⁵ that 'as there is no general jurisdiction afforded to the Labour Court in employment matters, the jurisdiction of the High Court is not ousted by s 157(1)' of the LRA 'simply because a dispute is one that falls within the overall sphere of employment relations'. Similarly, the Labour Court has 'concurrent jurisdiction' with the High Court in respect of any labour matters where a constitutional dispute is raised.⁶ The plaintiff therefore has an option to institute proceedings in either the Labour Court or the High Court, and the High Court's jurisdiction will only be ousted in respect of matters that 'are to be determined' by the Labour Court in terms of section 157(1) of the LRA.⁷

If the plaintiff's cause of action is based on the statutory claims of unfair discrimination in terms of the EEA and unfair dismissal (and unfair labour practice) in terms of the LRA, then the claims are based on causes of action that do not exist at *common-law* and for which relief is not available at *common-law*.⁸ The High Court therefore does not have jurisdiction to entertain the aforementioned claims, unless the cause of action is founded on *common-law* principles.⁹ The Labour Court has exclusive jurisdiction on causes of action based on the LRA provisions or in terms of any other labour matters to be determined by the labour court.¹⁰ Therefore, if both the EEA (and/or the LRA) and delict claims are brought by the plaintiff, then two separate courts will hear the matter.

⁴ *United National Public Servants Association of South Africa v Digomo* NO (2005) 26 ILJ 1957 (SCA) at para 4.

⁵ 2002 (2) SA 693 (CC) at para 40. See also s 157(1) LRA which reads:

Subject to the Constitution and section 173 [which deals with the Labour Appeal Court], and except where this Act provides otherwise the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

⁶ *Transnet Limited v PNN Chirwa* [2006] SCA 131 (RSA) at para 6.

⁷ *Fredericks* supra (n5) at para 40.

⁸ *Orr and another v University of South Africa* (2004) 25 ILJ 1484 (LC) at 1490I-1A.

⁹ *Orr* supra (n8) at 491A.

¹⁰ S 157 (1) LRA.

If the cause of action is statutory unfair discrimination in terms of the EEA, then the plaintiff's claim is based in labour law and the labour court is the appropriate forum to hear the case.¹¹ This means that the plaintiff has based her claim of statutory compensation and damages in terms of section 50 of the EEA. Similarly, a plaintiff can bring a claim for vicarious liability under the provisions of section 60 of the EEA (Labour Court jurisdiction) and/or frame her claim in terms of the *common-law* principles of vicarious liability (High Court jurisdiction).¹²

The advantage with a claim of sentimental loss and gender discrimination under the EEA is that the award for compensation and damages is not capped in that the Labour Court can make any appropriate order that is just and equitable where the employee has been unfairly discriminated against.¹³ It must be noted that a delictual claim for *iniuria* is also not capped under the *actio iniuriarum*. The advantage of pursuing the remedy in labour law is that the Labour Court will be more inclined to uphold the values underlying the EEA taking into account the discriminatory effect and the discriminatory context (workplace) in which sexual harassment occurred.

The High Court could refer to the EEA's protection against unfair discrimination when determining unlawfulness of conduct as a determinant of legal convictions of the community. If a claim is based on unfair dismissal and unfair labour practice in terms of the LRA, the award for compensation is capped at an equivalent of 12 months remuneration for an unfair dismissal and at 24 months remuneration for an automatically unfair dismissal.¹⁴ In *Fedlife Assurance Ltd v Wolfaardt*¹⁵ the court made a distinction between a cause of action based on fairness of conduct, a matter to be adjudicated by the

¹¹ *Ntsabo v Real Security CC* [2004] 1 BLLR 58 (LC) and *Christian v Colliers Properties* [2005] 5 BLLR 479.

¹² *Le Roux et al op cit* (n2) 77.

¹³ Ss 50(1)-(2) EEA.

¹⁴ S 194 LRA.

¹⁵ *Supra* (n3) at para 27.

Labour Court; and a cause of action based on unlawfulness of conduct, a matter which can also be adjudicated by the High Court.

It is submitted that in delict, 'unlawfulness' is judged against the objective standard of the *boni mores* of the community viewed against the backdrop of the letter and spirit of the Constitution with a view of protecting the rights of the plaintiff against unfair discrimination and gender inequality in the workplace. 'Unfairness' in labour law is not defined. However, guidance on the meaning of 'fairness' can be found in *NEHAWU v University of Cape Town and Others*¹⁶ where the Constitutional Court held that, in the context of the meaning of the concept of 'fair labour practice', 'what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept'.¹⁷ The court further held that 'in giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience'.¹⁸ The court concluded that the focus of the constitutional right to fair labour practice is:

The relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.

This means that in the context of the LRA, fairness involves a weighing up and balancing process of competing interests of the employee and employer, taking into account the precepts of equity and reasonableness in the totality of circumstances. It is argued that the Constitution has unified the standard used when determining 'fairness' in the LRA and 'unlawfulness' in delict. This is so because sections 8(3), 39(2) and 173 of the Constitution mandate the courts when interpreting any legislation, and when developing *common-law* to promote the spirit, purport and objects of the Bill of Rights.

¹⁶ 2003(2) BCLR 154 (CC).

¹⁷ *NEHAWU supra* (n16) at para 33.

¹⁸ *NEHAWU supra* (n16) at para 34.

In *Media 24 Limited, Gasant Samuels v Sonja Grobler*,¹⁹ relying on *Wolfaardt*²⁰, the court rejected the claim that Grobler's case was unfair labour practice to be heard by the Labour Court in terms of the LRA. The court further held that a dispute about the unlawfulness of an employer conduct as opposed to unfairness was not a matter to be heard by the Labour Court, and the High Court jurisdiction was thus not ousted. Grogan correctly submits that whether the distinction in *Grobler* (SCA)²¹ based on unlawfulness and actions based on unfairness holds merely because of the adjective 'unfair' is debatable.²²

The court in *Grobler* (SCA)²³ reasoned its rejection for a case of 'unfair labour practice' out of context when it relied on the *Wolfaardt*²⁴ principle based on the adjective 'unfair'. One of the jurisdictional defences raised was that Grobler's case was unfair discrimination in terms of the EEA and as such the Labour Court was the appropriate court to hear the matter in terms of section 10 of the EEA. This defence was rejected because the EEA was not yet in force at the time the cause of action arose.²⁵ It is therefore interesting to enquire what would have been the court's reasoning in rejecting the jurisdictional defence based on 'unfair discrimination' if the EEA had been in force at the time the cause of action arose.

It is argued that Grobler's cause of action was based in delict because the employer had negligently remained passive and permitted a hostile environment to ensue in breach of its legal obligation to protect the plaintiff and to ensure safe working conditions at its workplace.²⁶ It is for this reason that the Supreme Court of Appeal correctly rejected the jurisdictional defence

¹⁹ [2005] 7 BLLR 649 (SCA) at para 76.

²⁰ *Supra* (n3).

²¹ *Supra* (n19).

²² J Grogan 'Damages for Sexual Harassment: When Employers are Liable' (2005) 21 *Employment Law* 11 at 16.

²³ *Supra* (n19).

²⁴ *Supra* (n3).

²⁵ *Supra* (n19) at para 75.

²⁶ *Supra* (n19) at para 41.

that the Labour Court was the appropriate court to hear this matter and not merely on the differentiation between 'unlawfulness' and 'unfairness'.

Grogan rightly submits that a finding that a person has committed unfair discrimination is therefore a finding that a person had acted unlawfully.²⁷ However, the Supreme of Appeal in *Wolfaardt* noted the relevance of the plaintiff's cause of action by stating that where the subject of the employee's complaint is 'unlawfulness', it matters not that coincidentally the conduct might also be 'unfair' because that is not the gist of the employee's complaint.²⁸ It is submitted that it is not considered that an employee's right to claim damages at *common-law* based on an employer's vicarious liability for sexual harassment be excluded in cases where a remedy in terms of the EEA is available.

Furthermore, statutory and common-law remedies exist side by side in the context of discrimination against employees. However, the minority judgment in *Wolfaardt*²⁹ indicates why this is by no means self-evident in the context of dismissal. Froneman AJA, outlined the central importance of the Constitution and noted that the LRA gives content to the constitutional right to fair labour practice by way of a right not to be unfairly dismissed.³⁰ Furthermore, Froneman AJA, felt that it is inconceivable how an unlawful dismissal would not also be an unfair dismissal and that dismissal on grounds of unlawful breach of the contract of employment by an employer is unfair dismissal which must be exclusively dealt with by the Labour Court in terms of the LRA.³¹

It is submitted that the Supreme Court of Appeal correctly entertained *Grobler's* case on 'unlawfulness' because the subject matter of her complaint was 'unlawfulness' (delict) and not 'unfairness' (labour law). She could

²⁷ Grogan *op cit* (n22) 16.

²⁸ Supra (n3) at para 27.

²⁹ *Ibid.*

³⁰ *Wolfaardt* supra (n3) at para 32.

³¹ *Wolfaardt* supra (n3) at paras 42-4.

therefore not be forced to seek statutory remedies in terms of the LRA and the EEA on 'unfairness' when her grounds of complaint were clearly set out and based on *common-law* principles of 'unlawfulness'. This is distinguishable from the position in the United Kingdom, where common law remedies are no longer available in relation to the fairness of dismissal and 'a common law right embracing the manner in which an employee is dismissed cannot satisfactorily co-exist with the statutory right not to be unfairly dismissed'.³² Exceptionally, the employee is not precluded from bringing common law claims for damages arising from the manner of dismissal which flow directly from the employer's failure to act fairly when taking steps leading to dismissal because 'the employee has a common law cause of action which precedes, and is independent of, his subsequent dismissal'.³³

8.3 Jurisdictional defence in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ('COIDA')

The employer often raises the jurisdictional defence to bar the employee from bringing a civil claim against the employer. Section 35(1) of the COIDA deals with the substitution of compensation for other legal remedies and provides as follows:

No action shall lie by an employee or any dependant of an employee for recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.

The scope and application of the jurisdictional defence was confirmed in *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)*³⁴ where the Constitutional Court held that the COIDA is an exclusive remedy which serves to remove the employee's right to claim *common-law* damages.

³² *Johnson v Unisys Ltd* [2001] UKHL 13 at para 2.

³³ *Eastwood & another v Magnox Electric Plc; McCabe v Cornwall County Council & others* [2004] UKHL 35 at para 29.

³⁴ [1999] 2 BCLR 139 (CC).

The court further held that payment of compensation is not dependent on the employer's negligence or ability to pay nor is the amount subject to reduction by reason of the employee's contributory negligence.³⁵ This reasoning is consistent with the United States authority in *Sheehan v Delaney*,³⁶ where the court held that the mischief 'underlying the workers' compensation system is that, in exchange for prompt payment of income and medical benefits to injured workers, employers are immune from tort liability' and 'both employers and employees are entitled to the benefits of the Act without regard to fault'.

Rycroft and Perumal recommend that in the light of serious delays and legal costs involved, litigation is an inefficient alternate dispute resolution mechanism.³⁷ The writers proceed to outline the merit of the workers' compensation in sexual harassment claims in terms of the COIDA whereby the plaintiff employee will acquire 'the right to compensation without the expensive and complicated process of establishing negligence and liability'.³⁸ Rycroft and Perumal have a point that not everyone has access to the *common-law* courts and can afford costly and lengthy legal proceedings. Furthermore, no fault has to be proved in the COIDA claim. However, it is suggested that workers' compensation for sexual harassment would serve to trivialise the harm of sexual harassment and cause regression in combating sexual harassment in the workplace. Sexual harassment is contrary to the spirit of corporate governance and employers must exercise due diligence by taking responsibility for sexual harassment which should not be reduced to a case of workers' compensation.

A disadvantage with the jurisdictional defence can be found in section 22(1) of the COIDA which states that compensation shall be payable 'if an

³⁵ *Supra* (n32) at 146.

³⁶ 238 Ga App 662, 521 SE 2d 585 (1999) at 663.

³⁷ A Rycroft and D Perumal 'Compensating the Sexually Harassed Employee' (2004) 25 *ILJ* 1153 at 1168-9.

³⁸ *Ibid.*

employee meets with an accident resulting in his disablement or death'. It is submitted that sexual harassment affects the psychological well-being of the plaintiff but does not necessarily result in serious disability (which must be verified by the medical report)³⁹ or death. Absence of serious disability or death because of sexual harassment would leave the plaintiff without remedy in terms of the COIDA.

The relevance of the jurisdictional defence in sexual harassment is doubtful because sexual harassment violates public policy⁴⁰ and *boni mores*. Even if sexual harassment were to be found to fall under the COIDA, the plaintiff would still be left without remedy since the COIDA compensates for pecuniary loss only.⁴¹ In terms of *Jooste*,⁴² section 35(1) of COIDA deprives the plaintiff of the right to a *common-law* claim for damages yet the harm of sexual harassment often consists of non-pecuniary loss arising from violation of personality rights, which entails damage to the plaintiff's self-esteem, dignity, reputation, and privacy.

It is emphasized that sexual harassment is neither an injury nor a disease as intended by the legislature; nor does sexual harassment arise because of an 'accident' in the sense of a mistake or a catastrophe.⁴³ Sexual

³⁹ S 42 COIDA.

⁴⁰ See *Coit Drapery Cleaners, Inc v Sequoia Ins Co* 14 Cal App 4th 1595, 18 Cal Rptr 2d 692 Cal App 1 Dist (1993) where the court held that the public and statutory policy against sexual harassment of employees, would not be well served by a ruling which would exonerate a perpetrator from payment of damages for his own wilful act of sexual gratification, by shifting such liability to an insurer. See also *B & E Convalescent Center v State Compensation Ins Fund* 8 Cal App 4th 78, 9 Cal Rptr 2d 894 (1992) where the court held that indemnification by insurance for the conduct was precluded and that any other conclusion would undermine not only the strong statutory policy behind worker's compensation, but also the substantial and firmly established policies embodied in the anti-discrimination statutes that were alleged to have been violated.

⁴¹ See *Popovich v Irlanda* 811 P 2d 379 (Colo 1991) at 384, where the court held that the Workers' Compensation Act is designed to compensate an injured worker for a work-related injury or disease, along with associated medical and other costs, and the concomitant loss of earning capacity resulting in permanent or temporary industrial disability to the injured worker.

⁴² *Supra* (n34) at para 14.

⁴³ See *Employers Ins Co v Wright* 108 Ga App 380, 133 SE 2d 39 (1963) where the court held that words 'arising out of' mean that there must be some causal connection between the conditions under which the employee worked and the injury which he received. The court

harassment is a premeditated act whereas occupational injuries arise because of accidents and are by their very nature employment disasters.⁴⁴ This means that the jurisdictional defence of barring an action by a victim of sexual harassment in terms of the COIDA cannot hold water.

A jurisdictional defence set out in section 35(1) of the COIDA was raised in *Grobler (SCA)*.⁴⁵ The first appellant pleaded that the respondent's action was one envisaged by section 35(1) of the COIDA and that the respondent was barred from bringing an action against her employer other than in terms of the COIDA. The court held that the psychological disorder from which the respondent has been suffering was ultimately contracted because of the harassment, did not occur in the course of employment but rather while she was engaged in her own private activity, namely trying to sell her flat to the second appellant.⁴⁶

The Supreme Court of Appeal thus dismissed this defence as being without merit and held that the present action was not one brought in terms of the COIDA.⁴⁷ It is argued that the jurisdictional defence in the COIDA would not have succeeded even if the Supreme Court of Appeal had found the incident to be in the course of employment and not whilst engaged in a private activity, because in terms of the COIDA the incident must also simultaneously arise out of employment. Both elements must be satisfied⁴⁸

reasoned that an accident must be one resulting from a risk reasonably incidental to the employment and that a risk is incidental to the employment when it belongs to, or is connected with, what a workman has to do in fulfilling his contract of service.

⁴⁴ In *SCI Liquidating Corp v Hartford Ins Co* 272 Ga 293, 526 SE 2d 555 (2000) the court held that the worker's compensation did not apply where a claim originated from a sexual harassment.

⁴⁵ *Supra* (n19).

⁴⁶ *Supra* (n19) at para 77.

⁴⁷ *Ibid.*

⁴⁸ The difference between the terms 'in the course of' and 'arising out of' employment was explained in *Popovich supra* (n41) at 383, where the court held that:

In the "course of employment" generally refers to "the time, place and circumstances under which the injury occurred".... The "course of employment" requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions.... The term "arising out of" is narrower than the term "in the course of"... An injury or occupational disease "arises out of"

since 'these are two distinct concepts' and 'arising out of employment is the wider of the two concepts'.⁴⁹

In *Ntsabo*⁵⁰ the employer raised a jurisdictional defence and argued that the post-traumatic stress suffered by Ntsabo was a condition that should be dealt with in terms of the COIDA. The court dismissed the jurisdictional defence raised by the employer under the COIDA and noted as follows:

The condition of the Applicant was clearly brought on by conduct which fell outside the boundaries of the duties, directly and indirectly, of both Mr Dlomo and the applicant. The conduct of which the applicant complained did not fall anywhere within the job description of Mr Dlomo or that of the applicant. Consequently the condition of the applicant does not fall within the confines of the COIDA as it did not involve a condition listed in Schedule 3 thereof and neither did it arise from or in the course and scope of her employment (nor indeed his).⁵¹

The court in *Ntsabo*⁵² reasoned that since sexual harassment was not in the course of employment in the sense that it fell outside of the perpetrator's job description, then the wrongful conduct fell outside the confines of the COIDA. It is worth comparing *Ntsabo*⁵³ with *K v Minister of Safety and Security*⁵⁴ where the Constitutional Court held that rape was indeed within the scope of employment because there was a close nexus between the delict committed by policemen and the purposes of the employer. The court reasoned that at the time of commission of rape, the policemen were simultaneously failing in their constitutional and statutory duties to protect K, and they infringed her rights to dignity and security of the person.⁵⁵

One asks oneself what will be court's reasoning in future when dismissing the jurisdictional defence in terms of the COIDA if the

employment when it has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment.

⁴⁹ C Thompson and P Benjamin *South African Labour Law* (2006) 2 at H1-16.

⁵⁰ *Supra* (n11).

⁵¹ *Supra* (n11) at 97.

⁵² *Supra* (n11).

⁵³ *Ibid.*

⁵⁴ [2005] 8 BLLR 749 (CC).

⁵⁵ *Supra* (54) at para 48.

Constitutional Court in *NK*⁵⁶ has now found sexual harassment to be in the course and scope of employment contrary to the strict traditional approach that sexual harassment was not part of job description. In *Grobler (SCA)*⁵⁷ Farlam JA noted that 'it may well be that employees who contract psychiatric disorders as a result of acts of sexual harassment to which they are subjected in the course of their employment can claim compensation under section 65'. Even though *Grobler (SCA)*⁵⁸ found sexual harassment to be 'in the course of employment and did not discard the possibility of the jurisdictional defence being successfully invoked, the COIDA remedy will fail because sexual harassment does not 'arise out of' and 'in the course of' employment. For the purposes of the COIDA an accident⁵⁹ or a disease⁶⁰ must 'arise out of' and 'in the course of' employment – 'in workers' compensation law, the terms "in the course of" and "arising out of" are not synonymous'.⁶¹

Although decided in terms of earlier statutes, case law illustrates that both requirements must be independently satisfied to give substance to the meaning of 'arise out of and in the course of employment' in terms of COIDA.⁶² The criteria used was substantially identical in deciding whether the accident 'arose out of and in the course of employment' in the terms of the section 25 of the Workmen's Compensation Act 30 of 1941. In *Human v Workmen's Compensation Commissioner*⁶³ Ramsbottom J held that the question whether an accident arose out of or in the course of a workman's employment may be a pure question of fact, or it may be a question of law, and in the latter case it may be a question as to the interpretation of the Act.

⁵⁶ *Supra* (n54).

⁵⁷ *Supra* (n19) at para 77.

⁵⁸ *Supra* (n19).

⁵⁹ S 1 COIDA.

⁶⁰ S 65(1)(a) COIDA.

⁶¹ *Popovich supra* (n41) at 383.

⁶² See *Augustyn v Workmen's Compensation Commissioner* 1948 (1) SA 115 (T); *Ward v Workmen's Compensation Commissioner* 1962 (1) SA 728 (T); and *Western Platinum Ltd v Santam Insurance Ltd* 1994 (1) SA 480 (W).

⁶³ 1956 (2) SA 461 (T) at 462.

In *Ward v Workmen's Compensation Commissioner*,⁶⁴ Hiemstra J held that control by the employer is the correct test to establish the 'course of employment'. It is submitted that in the context of COIDA, the course of employment assesses whether the employee was at the employer's beck and call at the time of the accident. Furthermore, the nexus between the accident and the employment must be sufficiently strong as to bring the accident within the scope of employment.⁶⁵ Rumpff JA defined the term 'arise out of employment' in *Minister of Justice v Khoza*⁶⁶ to mean 'in a broad sense a causal relationship between employment and accident'. Rumpff⁶⁷ JA went on to list exceptions of what would not 'arise out of employment', as follows:

It is in any case clear that the causal connection for the purposes of the Act will be absent, *inter alia*, if the accident is of such a nature that the workman would have sustained the injuries even if he was at a place other than that required by his employment or when the workman by his own act removes the relationship between the accident and employment or when the workman is intentionally injured by another and the motive for the assault has no relationship with the duties of the workman.

Rumpff JA's judgment in *Khoza*⁶⁸ is of relevance in the context of sexual harassment in that it involves intentional wrongdoing, which has no causal correlation to the employee's duties and the employment to conclude that it arose out of employment. The fact that sexual harassment occurred in the workplace is incidental and the employment is not a *sine qua non* of sexual harassment, and is thus not sufficient to 'arise out of employment'. The causal link contemplated by COIDA between sexual harassment and the employment is demonstrably absent; sexual harassment is not part of the *modus operandi* of the employment activities in order to form part of the terms and conditions of employment. In order to 'arise out of employment', Mureinik⁶⁹ emphasized that 'the employment need only be a *sine qua non* of the accident'. It is argued that sexual harassment does not arise out of

⁶⁴ 1962 (1) SA 728 (T).

⁶⁵ *Augustyn v Workmen's Compensation Commissioner* 1948 (1) SA 115 (T) at 118.

⁶⁶ 1966 (1) SA 410 (A) at 417D.

⁶⁷ *Khoza* supra (n66) at 417G-H.

⁶⁸ *Ibid.*

⁶⁹ E Mureinik 'Workmen's Compensation and the Mugging that Arose "out of" Employment' (1980) 1 ILJ 33 at 37.

employment because 'as a matter of policy, sexual harassment is not a risk inherently connected to the employment relationship'.⁷⁰

8.4 Conclusion

This chapter has highlighted that the plaintiff is at liberty to frame her remedy in any area of law and the defendant cannot object to her preferred remedy merely because it coincides with another course of remedy. It has also been shown that any attempt to substitute the jurisdictional defence for the *common-law* remedies must be discouraged. Sexual harassment does not 'arise out of employment' and is not compensable in terms of the COIDA because sexual harassment is 'specific to the victim'⁷¹ and is not 'attributable to neutral or unexplained sources which would have injured any person who happened to be in the position of the claimant at the time and place in question'.⁷² It is clear from the pre-amble of the COIDA that its purpose is to provide compensation for disablement or death caused by occupational injuries or diseases and 'nothing in the Workers' Compensation Act suggests that it is intended to cover injuries resulting from sexual harassment'⁷³ and 'nowhere is sexual harassment expressly addressed in the Act'.⁷⁴ The jurisdictional defence under the COIDA is in fact an inefficient loophole for the non-diligent employer who wants to evade his *common-law* duty of care and statutory obligations in the EEA.

⁷⁰ *Horodyskyj v Karanian* 32 P 3d 470 (Colo 2001) at 476-7.

⁷¹ *Popovich* supra (n41) at 383.

⁷² *Ibid.*

⁷³ *Horodyskyj* supra (n70) at 479.

⁷⁴ *Ibid.*

Chapter Nine – Criminal Remedies

9.1 Outline

Women simply want to be left alone in the workplace to do their jobs. Women don't want to use the law to gain advantage, to get revenge or to put themselves in positions of power. In virtually every case in which a woman has turned to the courts for help, she has done so in desperation after other efforts to solve the problem have failed.¹

The victim of sexual harassment may have recourse in criminal law because the elements of what constitutes 'sexual harassment' are specific offences in themselves in our criminal law, and thus warrant prosecution. This chapter discusses an overlap between the harm of sexual harassment and various specific offences in the criminal context.

9.2 Specific crimes involved in sexual harassment

The conduct of sexual harassment can potentially include specific offences², which are:

- a) Indecent assault;
- b) Common assault;
- c) *Crimen iniuria*;
- d) Rape; and
- e) Extortion.

It is submitted that under these crimes, there is no question of vicarious liability on the part of the employer for the wrongful act committed and the accused is liable personally under the principles of criminal law in that he

¹ W Petrocelli and BK Repa *Sexual Harassment on the Job* 4ed (1998) at 1.

² See also para 4.6.3.2 South African Law Commission Discussion Paper 85 (Project 107) 'Sexual Offence: The Substantive Law' (1999) which states that:

The actions included in the definition of sexual harassment may constitute criminal charges, for example, indecent assault, assault, *crimen iniuria* or even rape. Individuals outside of the workplace could be prosecuted for any one of these crimes.

himself is answerable for the sexual offence and crime committed. The state prosecution has to discharge the onus beyond reasonable doubt and is heavier than the onus in a civil suit where the plaintiff has to prove her case on balance of probabilities.

9.2.1 Indecent Assault

The crime of indecent assault consists in 'an assault, which by nature or design is of an indecent character'³ and is directed with intent to assault indecently⁴. This is a crime of a sexual nature, which is prevalent in sexual harassment cases as in *Ntsabo v Real Security CC*,⁵ where the harasser unlawfully touched the victim's breasts, thighs, buttocks, genitals and simulated a sexual act on her, which resulted in him ejaculating on her skirt. On the facts, Ntsabo could have proceeded criminally against the perpetrator on grounds of indecent assault.

9.2.2 Common assault

Common assault is another extreme form of sexual harassment in that it involves use of physical violence or threat of physical violence. The crime of assault consists in 'unlawfully and intentionally:

- a) applying force to the person of another, or
- b) inspiring a belief in that other person that force is immediately to be applied to him or her'.⁶

³ J Burchell and J Milton *Principles of Criminal Law* 3ed (2005) at 691.

⁴ Burchell and Milton *op cit* (n3) 698.

⁵ [2004] 1 BLLR 58 (LC).

⁶ Burchell and Milton *op cit* (n3) 680.

In *Ntsabo*⁷ case the essentials of a crime of assault were satisfied in that the defendant entered the guardroom where Ntsabo was having her lunch, and closed the door with a piece of wire. He proceeded to put his firearm, on the table near where she was seated and threatened to shoot her if she broke her silence and screamed. It is submitted that Dlomo aroused fear on the victim that physical force was about to be applied on her.

9.2.3 Crimen iniuria

The crime of *crimen iniuria* consists in 'unlawfully and intentionally impairing the dignity or privacy of another person'.⁸ These personally rights are also entrenched in section 10 and 14 of the Bill of Rights. The need for a criminal sanction (as opposed to civil redress for impairment of dignity) is actuated by the seriousness of impairment in that 'there are some insults to the dignity of a human being that are so gross as to evoke public outrage and to call for public denunciation through criminal law'.⁹

9.2.4 Rape

Rape is an extreme case of sexual harassment, which displays 'total contempt for the personal integrity and autonomy of the female victim'; and 'short of homicide, it is the ultimate violation of self'.¹⁰ Rape exists along with other forms of sexual assault and 'it belongs to that class of indignities against the person that cannot ever be fully righted, and that diminishes all humanity'.¹¹

⁷ Supra (n5).

⁸ Burchell and Milton *op cit* (n3) 746. See ch 5.2 on the discussion of the *common-law* remedy for an impairment of dignity under the *actio iniuriarum*.

⁹ Burchell and Milton *op cit* (n3) 747.

¹⁰ *Coker v Georgia* 97 S Ct 2861 (1977) at 2869.

¹¹ *Mary M v City of Los Angeles* 814 P 2d 1341 (1991) at 1353.

The crime of rape consists in 'intentional unlawful sexual intercourse with a woman without her consent'.¹²

9.2.5 Extortion

It is argued that extortion is prevalent in *quid pro quo* sexual harassment where the harasser intimidates his victims by promising good career prospects if they comply with his sexual demands and threatens a tangible employment detriment for non-compliance. The crime of extortion consists in 'taking from another some patrimonial advantage by intentionally and unlawfully subjecting that person to pressure, which induces him or her to submit to the taking'.¹³ The mischief of the crime of extortion seeks to outlaw blackmail or intimidation to obtain an advantage, which is not lawfully due to the extorter. An extraction of an advantage is thus a material feature in the crime of extortion, 'whether or not such advantage is of a patrimonial nature'.¹⁴

¹² Burchell and Milton *op cit* (n3) 699. See also *K v Minister of Safety and Security* [2005] 8 BLLR 749 (CC) where the employer was held vicariously liable for the rape of K by policemen. The gender-specific definition of the *common-law* offence of rape is currently in the process of substantial reformation in terms of the Criminal Law (Sexual and Related Matters) Amendment Bill [B50B-2003] and replacing it with a new expanded statutory offence of rape, applicable to all forms of sexual penetration without consent, irrespective of gender.

¹³ Burchell and Milton *op cit* (n3) 826.

¹⁴ In *Ex parte Minister van Justisie: In re S v J, S v Von Molendorff* 1989 (4) SA 1028 (A) at 1041I-2A, the court saw no need to distinguish between instances where intimidation is applied to secure a patrimonial or a non patrimonial advantage. The court thus held that:

According to *communis opinio*...which runs through our *common-law* like a golden thread, the benefit in extortion should either be money or a patrimonial benefit. If there is a need in the community for extortion to be extended, it is a matter of policy for the consideration of the Legislature.

The *common-law* crime of extortion has been developed and the advantage in extortion can now be non-patrimonial in nature as provided for in s1 of the General Law Amendment Act 139 of 1992 which states that:

At criminal proceedings at which an accused is charged with extortion it shall with respect to the object of the extortion be sufficient to prove that any advantage was extorted, whether or not such advantage was of a patrimonial nature.

9.3 Past sexual history

In criminal law, the 'defendant's belief in consent' is 'assessed exclusively from the defendant's point of view'.¹⁵ Evidence about the victim's past sexual history is often admitted 'as being relevant to both the honesty of the defendant's belief in consent and the credibility of the victim's assertion that she did not consent'.¹⁶ Zeffertt has correctly submitted the cautionary approach to be adopted as follows:

What is called for...is an enlightened attitude, on the one hand, that eschews baseless and archaic beliefs, such as that, because a victim consented to intercourse with X she was the kind of person who would consent to it with Y, or that, because a woman consented to intercourse with X on one occasion, she did so on another; but on the other hand, the courts should realize that sexual conduct may sometimes have a relevance. Since no two cases are exactly alike, 'precedents' must be handled with caution.¹⁷

The court has discretion to admit past sexual history of the complainant if it is satisfied, that such evidence or questioning is 'relevant'.¹⁸ This is similar to Federal rule of evidence 412(a) which creates a presumption that past sexual history is inadmissible by stating that evidence of an alleged victim's 'sexual behaviour' or 'sexual predisposition' is inadmissible, with limited exceptions, in all 'civil or criminal proceeding[s] involving alleged

¹⁵ S Jagwanth, PJ Schwikkard and B Grant *Women and the Law* (1994) at 76.

¹⁶ *Ibid.* See also *S v Zuma* 2006 (7) BCLR 790 (W) at para 37, Van der Merwe J admitted cross examination and evidence on the complainant's past sexual history and reasoned as follows:

In my judgment the purpose of the cross-examination and the evidence the defence wanted to lead concerning the complainant's behaviour in the past was not to show that she misbehaved with other men. In fact it was aimed at showing misconduct in the sense of falsely accusing men in the past. The cross-examination and evidence are relevant to the issue of consent in the present matter, the question of motive and indeed credibility as well. It was not aimed at showing that the complainant was a woman of questionable morals. It was aimed at the investigation of the real issues in this matter and was fundamental to the accused's defence.

¹⁷ DT Zeffertt, AP Paizes and A St Q Skeen *The South African Law of Evidence* (2003) at 247.

¹⁸ Past sexual history of the plaintiff maybe only be admissible as evidence with the permission of the court in terms of section 227(2) of the Criminal Procedure Act 51 of 1977 as amended which states that:

Evidence as to sexual intercourse by, or any sexual experience of, any female against or in connection with whom any offence of a sexual nature is alleged to have been committed, shall not be adduced, and such female shall not be questioned regarding such sexual intercourse or sexual experience, except with the leave of the court, which leave shall not be granted unless the court is satisfied that such evidence or questioning is relevant: Provided that such evidence may be adduced and such female may be so questioned in respect of the offence which is being tried.

sexual misconduct'.¹⁹ Rule 412(b)(2)²⁰ in a civil case creates an exception that 'otherwise admissible' evidence may only be introduced if the proponent can show that 'its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party'.

In *Wolak v Spucci*²¹ the court held that rule 412, which explicitly includes civil cases involving sexual misconduct, encompasses sexual harassment lawsuits. The court held that the evidence of plaintiff's sexual behaviour was inadmissible because it was of marginal relevance. The court concluded that:

Whether a sexual advance was welcome, or whether an alleged victim in fact perceived an environment to be sexually offensive, does not turn on the private sexual behaviour of the alleged victim, because a woman's expectations about her work environment cannot be said to change depending upon her sexual sophistication.²²

It is submitted that evidence of the plaintiff's sexual conduct whilst 'on-duty, at the workplace, and with the named defendants is relevant'.²³ Evidence of the plaintiff's past sexual history is not relevant in the context of sexual harassment in the workplace (unless the plaintiff had an intimate relationship with the defendant). It is suggested that the plaintiff's behaviour in her private life is very different to her expected professional and ethical behaviour in the workplace. In the workplace, the plaintiff expects her labour and constitutional rights to be protected because violation thereof would threaten her livelihood and career progress.

It is highlighted that past sexual history of the complainant with the accused is relevant to establish 'consent', complainant's credibility and the accused honest comprehension of consent. However, evidence of the plaintiff's sexual conduct 'while she was off-duty, outside the workplace and which did not involve conduct with the named defendants' is not

¹⁹ Federal Rules of Evidence Rule 412, 28 USCA (1978) as amended in 1994.

²⁰ *Ibid.*

²¹ 217 F 3d 157 (2d Cir 2000).

²² *Wolak supra* (n21) at 160.

²³ *Barta v City and County of Honolulu* 169 FRD 132 (D Haw1996) at 135.

admissible.²⁴ Therefore, 'other evidence, such as non-workplace conduct, is irrelevant and inadmissible'.²⁵

9.4 Conclusion

A criminal remedy is essential in ensuring that the perpetrators pay for their crimes through punishment 'exacted by the State rather than the victim of the crime'.²⁶ The victim can then seek compensation and damages through civil redress against the employer. The essence of this chapter has shown that it is logical for the perpetrator to be punished for the crime he has committed because in many instances he is a man of straw who is unlikely to be financially able to pay for civil damages. It has been noted that criminal remedies are less viable to pursue because of the onerous burden of proof in criminal law requiring the state to prove beyond reasonable doubt before the court can find the perpetrator liable. Furthermore, the judiciary is accustomed to dealing with traditional instances of crimes as specific offences and thus may be reluctant to recognize the crime of sexual harassment within the existing framework of these crimes.

²⁴ *Supra* (n23) at 136.

²⁵ *Holt v Welch Allyn Inc* 2000 WL 98118 (NDNY 2000) at 1.

²⁶ *Burchell and Milton op cit* (n3) 68.

Chapter Ten - Conclusion

If the first woman God ever made was strong enough to turn the world upside down all alone, these women together ought to be able to turn it back, and get it right side up again! And now they is asking to do it, the men better let them.¹

The cumulative effect of this thesis has highlighted that sexual harassment must not be viewed as an isolated and independent act but must be examined in the context and circumstances in which it occurs. The thesis has provided evidence that in many instances, a harasser is not a stranger to his master and on a frolic of his own but harasses in his capacity as a supervisor, confidant or caretaker. It is concluded that the challenge of accomplishing gender equality is the same as that facing South Africa after the apartheid era in that people's attitudes, perceptions, and behaviours have to be re-socialised to instil principles of democracy, equality, and *ubuntu*.

The solution to eradicating sexual harassment in the workplace does not only lie in the remedies enunciated in this thesis – but in the role of education in transforming people's attitudes and enhancing respect for other employee's dignity/*ubuntu* and a comprehensive campaign by both the employees and employers to ensure a 'harassment free' environment. It is essential that every company have a sexual harassment policy, which forms part of the conditions of employment, and breach thereof should constitute misconduct warranting dismissal.

The employer must not only adopt a reactive approach and respond to sexual harassment as and when it occurs because that signifies lack of commitment to the elimination of gender discrimination. The reactive approach falls short of putting safeguards against gender discrimination and taking preventative steps, which would help, educate, and change the employees' attitudes to the harm of sexual harassment. Failure to adopt a proactive approach and an uncompromising stance by the employer on sexual

¹ Sojourner Truth 'Address to the Women's Rights Convention in Akron, Ohio' (1851).

harassment may result not only in costly lawsuits which will serve to tarnish the good corporate governance and public image of the employer, but will also result in a low worker morale characterized by decline in productivity and constructive dismissal. It is concluded that it is the employer's non-delegable duty to ensure a state of 'wellbeing', stability, and harmony in the workplace marked by respect of dignity/*ubuntu* and rights of employees.

It is suggested that companies must be pro-active and educate their staff on the contents of the sexual harassment policies and must give clear examples of prohibited conduct.² Examples of prohibited conduct and management interaction with employees during training programmes will help distinguish between what is acceptable and unacceptable behaviour in the workplace. Another important aspect of education is empowering women to be assertive and to unapologetically learn to say 'no' to unwanted sexual attention and discard the notion that they are helpless, inferior to men and thus submissive.

Of importance is the judicial test used to assess whose perception of the nature of sexual harassment is decisive. The aim of the research has been to explore various tests - the reasonable man; the reasonable woman; the reasonable person with the same fundamental characteristics; and the reasonable person in the position of the victim test. It is concluded that the judicial test, which should be adopted, is the 'reasonable person in the position of the victim' test. This test is gender neutral (includes not only opposite-sex harassment but same-sex harassment as well) and is objectively determined.

The 'reasonable person in the position of the victim' test is also in harmony with the Constitution in that the objectionable conduct must exceed the bounds of reasonable behaviour considered tolerable in an open and

² Items 5.3.1.1-3 2005 Code - examples of verbal, non-verbal and physical conduct which constitute sexual harassment.

democratic society and must undermine the precepts of dignity, equality and *ubuntu*. It has been argued that the objective test to sexual harassment guards against a floodgate of frivolous claims whilst taking into account the legal convictions of the community and the spirit, purport and objects of the Bill of Rights. Furthermore, the reasonable person in the position of the victim test is relevant in the context of vicarious liability. It is concluded that the objective test will help keep liability of the employer within manageable and reasonable bounds.

Sexual harassment as gender discrimination underscores the attendant harm caused by sexual harassment, which includes violation of constitutional rights; economic harm through constructive dismissal; treating women in total disregard of their productive capacity in the workplace; work sabotage; institutionalizing gender stereotypes; and relegating women to a status of sub-humans through impairment of dignity/*ubuntu*. It has been highlighted that sexual harassment is learned human behaviour, which can be controlled and eliminated, and thus the fight against sexual harassment can be won. The case for regarding sexual harassment as a form of unfair discrimination in terms of section 6(3) of the EEA is what captures the essence of what is wrong with sexual harassment. It has been shown that sexual harassment amounts to gender discrimination because women are sidelined; disadvantaged; and discriminated against in the context of employment conditions, terms and benefits, in a way that men are not.

A central theme of the thesis is that the future of the law on sexual harassment lies in the adoption of a multi-dimensional approach, which focuses on dignity/*ubuntu*. The essence of a multi-dimensional approach recognizes that the harm of sexual harassment gives rise to various remedies in delict, labour law, constitutional, and criminal law, which are not mutually exclusive, and the plaintiff can use one or more of the available remedies. At the heart of the proposed expansive approach, lies an emphasis on dignity/*ubuntu* in all the remedies because the harm of sexual harassment is

first comprehended as being inimical to dignity/*ubuntu*, which is an essential pillar in the celebration of freedom, self-autonomy, and humanity in a democratic society.

The emphasis on '*ubuntu*' in the context of sexual harassment is the absence of discrimination, indignity and inequality in the workplace and underscores promoting morality ('harassment free' environment) and treating women as co-workers, equals and fellow human beings. A central focus of *ubuntu* in eradicating sexual harassment in the workplace is that it promotes 'wellbeing'; humanity; integrity; consideration; unity; selflessness; respect; and moral norms and values. An inescapable conclusion is that women can thus never enjoy and assert their equality as a class, if they are not liberated as autonomous individuals but rather treated as sex-objects subjected to unfair discrimination in violation of their human worth, *ubuntu* and self-respect. The essence of *ubuntu* and dignity thus involves enabling women to live life to the fullest as free individuals capable of making their own choice of intimate partners and being masters of their own career paths and success - unhindered by obstacles of gender discrimination in the workplace.

A central focus of the thesis has been the discussion of the delictual remedy under the *actio iniuriarum* and the constitutional protection of dignity. South Africa is distinguished and developed in its protection of dignity compared to the United States where dignity is not specifically protected in the Constitution but is conceptualized and protected as an affront to equality or privacy. Hence as highlighted in the thesis, many of the tort cases in the United States have to fit the sexual harassment claims into the existing pigeon-holes of action for slander, false imprisonment, intentional infliction of emotional harm, intrusion of physical solitude, battery and invasion of privacy. Dignity is of fundamental importance in South Africa because it is protected in the Constitution and under the *common-law actio iniuriarum*.

It is concluded that there can never be equality without respect for dignity hence sexual harassment in the workplace has been conceptualized as an affront to dignity and as such an obstacle to gender equality. This factor will be one of the key determining features in the assessment of damages for sentimental loss both under section 50(2)(b) of the EEA and the *actio iniuriarum* since sexual harassment involves a violation of the constitutional rights. It is emphasized that equality and other rights enshrined in the Bill of Rights do not exist in vacuum but are informed by the value of dignity. This means that dignity is essential in the celebration of human existence and self-worth because women cannot be equal when their personhood is violated.

The courts will therefore be more inclined to protect victims of sexual harassment and deliver the protection and promise of the Constitution by restoring *ubuntu* and dignity violated by an act of sexual harassment. It is concluded that even though the right to dignity is not absolute, it is unlikely that a limitation clause contained in section 36 of the Constitution will be reasonable and justifiable. Similarly, in delict the concept of dignity is qualified by the concept of 'reasonableness' when dealing with the objective test of dignity outlined in *De Lange v Costa*.³

The focus of the thesis has also been on *statutory* vicarious liability in terms of section 60 of the EEA, which it is argued, is a more effective remedy than *common-law* vicarious liability. It has been highlighted that the advantage with *statutory* vicarious liability in terms of section 60 of the EEA is that the *common-law* rules of 'scope of employment' are not part of the test. Section 60 of the EEA is broader than *common-law* vicarious liability in that it creates a unique type of *statutory* vicarious liability, which contains an element of, deemed personal liability on the part of the employer for failure to take steps and ensure compliance with the EEA. It is thus neither an accurate reflection of *common-law* liability nor equivalent to *common-law* vicarious liability.

³ 1989 (2) SA 857 (A).

It is concluded that the affirmative defence in section 60(4) of the EEA will serve to keep *statutory* vicarious liability within reasonable bounds in that the employer is offered a shield against vicarious liability if he can prove that he took reasonable measures to prevent and remedy sexual harassment. Therefore, *statutory* vicarious liability in terms of section 60 of the EEA is not an open-ended liability but is curbed by the affirmative defence, which is not similarly available to the employer under the *common-law* vicarious liability. It is concluded that if the claim were in delict, the only relevance of the reasonable steps taken by the employer would seem to be to exclude fault – negligence or intention. Fault is not one of the elements of a section 60 enquiry but is deemed in terms of section 60(3) of the EEA.

A caution has been emphasized through the discussion of *statutory* vicarious liability that the employer is under a legal obligation to encourage its employees to 'keep all communications and behaviours strictly professional' and reprimand them that 'any sexual remarks, pictures, jokes, or innuendo should be taboo at work'.⁴ Similarly, it has been shown that the strict rules of agency, which were interpreted by the courts to consider sexual harassment as a frolic of one's, own and so excluded from the scope of employment, do not apply to the EEA. The requirements for establishing section 60 liability, are less demanding than in the case of the plaintiff who chooses to pursue a *common-law* remedy of vicarious liability.

It has been emphasized that another added advantage in pursuing *statutory* vicarious liability in terms of section 60 of the EEA is that sentimental damages can be claimed under section 50(2)(b) of the EEA. The plaintiff is not barred from simultaneously pursuing the remedy for unfair dismissal in terms of the LRA, and for unfair discrimination in terms of the EEA. It has been shown that a joint claim under the LRA and the EEA is advantageous in that compensation in terms of section 194 of the LRA is

⁴ D Orlov and MT Roumell *What Every Manager Needs to Know about Sexual Harassment* (1999) at 76.

capped to a maximum of 12 months (unfair dismissal) and 24 months remuneration (automatically unfair dismissal). The award for compensation and damages in terms of section 50 of the EEA is discretionary (as it used to be under section 46(9)(c) of the old LRA).

It has been highlighted that the 2005 Code has made a valuable contribution in outlining the nature of sexual harassment, the scope of employer duties and guidelines on how to deal with sexual harassment in the workplace. It has been noted that the 2005 Code is instructive as a 'guide' only and does not give rise to enforceable legal rights and obligations. However, compliance with the 2005 Code is relevant as evidence when establishing unfair discrimination in terms of the EEA and in determining the extent to which the employer discharged its duty of care and obligations in accordance with the provisions of section 60(2) of the EEA.

The 2005 Code has thus been effective in promoting the letter and spirit of the EEA, which is aimed at the eradication of gender discrimination as a form of unfair discrimination in the workplace. However, a shortcoming has been identified in item 4 of the 2005 Code in that it only defines sexual harassment as unwelcome conduct 'of a sexual nature' and does not refer to other forms of conduct which are not of a sexual nature. In order to conceptualize the harm of sexual harassment properly, it is proposed that its definition must include 'non-sexual' forms of harassment, which are gender related, and affect women as workers and human beings (not as merely sexual beings).

The 2005 Code states that 'the conduct should constitute an impairment of dignity, taking into account the circumstances of the employee; and the respective positions of the employee and the perpetrator in the workplace'.⁵ An impairment of dignity under the EEA is thus inferred from circumstantial evidence stemming from sexual harassment. However, the

⁵ Item 5.4 2005 Code.

factors which are taken into account when assessing damages for sentimental loss under section 50(2)(b) of the EEA are the same as those taken into account under delictual assessment of impairment of dignity. It has been shown that the EEA offers discretionary payment for damages for impairment of dignity thereby alleviating the need for the plaintiff to pursue the *actio iniuriarum*. It is concluded that another fundamental advantage of the EEA is that a subjective test of sexual harassment is adopted - even if a broad interpretation is taken of 'scope of employment' under *common-law* vicarious liability.

The thesis has also examined the historical development of the remedy of vicarious liability in South Africa, United States, United Kingdom and Canada. It has been highlighted how the courts have narrowly and rigidly applied the principle of vicarious liability to deny protection to the victims of sexual harassment for what is perceived as a 'frolic of one's own', 'personal', or 'not within the job description' of the perpetrator to harass employees. It is concluded that it would be contrary to *ubuntu*, public policy, the legal convictions of the community, and the spirit of anti-discrimination legislation (which includes both the Constitution and the EEA) if sexual harassment was considered to be within the scope of employment only if it was the perpetrator's designated duty to sexually harass women.

It is concluded that the use of the term 'personal' is often used to justify sexual harassment as a natural phenomenon and serves to trivialise it by removing it from the spotlight and public arena, justifying lack of legal and employer intervention to the problem of sexual harassment. Furthermore, recognizing sexual harassment as a 'frolic of one's own', 'isolated incident' or 'personal' serves to perpetuate male dominance and maintains the status quo of gender discrimination in the workplace - and amounts to failure to acknowledge that there is fire even when there is a clear cloud of smoke in the air.

It is concluded that the essence of sexual harassment lies in the overlap between execution of duties and mismanagement of those duties in that mismanagement involves an omission or failure to carry out duties. Mismanagement of authorised tasks or acting contrary to the employer's instructions does not make sexual harassment an independent act or mere frolic of one's own. The nature of modern employment goes 'beyond the principal parties to the contract of employment' and includes a 'complex mixture of tasks and intimate relationships' which are often improperly conducted.⁶ It is submitted that the United States supervisor-approach to vicarious liability has truly captured the essence of the risk of abuse inherent in the supervisor's delegated power. This is so because the authority in implementing economic decisions in the workplace always aids a supervisor.

It is concluded that sexual harassment has far more to do with the corruptive and abusive exercise of supervisory power or abuse of a trust relationship, than with mere sexual conduct. Sexual harassment is thus an expression of masculine and organizational power. Deemed personal liability in terms of section 60(3) of the EEA is also justifiable in the context of supervisory harassment in deeming gender discrimination committed by the perpetrator to have been committed by the employer since the supervisor is always aided by organizational power in committing sexual harassment. It is thus emphasized that it is the employer's duty to ensure that the supervisor's powers are not left unchecked or mismanaged to engage in acts of sexual harassment.

In choosing a suitable remedy, it has been highlighted that the plaintiff is also faced with jurisdictional issues. It has been established that for all the statutory claims based on the LRA and the EEA, the proper court to hear the matter is the Labour Court, and the High Court does not have a jurisdiction in such instances (unless the cause of action is grounded on *common-law*

⁶ R le Roux, T Orleyn and A Rycroft *Sexual Harassment in the Workplace: Law, Policies and Processes* (2005) at 91.

principles).⁷ A distinction has been drawn between scope of compensation in delict and in contract. The same set of facts may give rise to a claim for damages in delict as well as one in contract and allow the plaintiff to elect the action to employ against the employer.⁸ It has been highlighted that an action for breach of contract will entitle the plaintiff to pure economic loss suffered and the plaintiff cannot recover damages (as in delict) for pain and suffering (intangible loss).⁹

In some causes of action, there is an overlap and the Labour Court has concurrent jurisdiction with the High Court. It is concluded that the plaintiff therefore has an option to institute proceedings in either the Labour Court or the High Court, and the High Court's jurisdiction will only be ousted in respect of matters that 'are to be determined' by the Labour Court in terms of section 157(1) of the LRA. It is concluded that the plaintiff is at liberty to choose how to ground her cause of action by taking into account the advantages and disadvantages of each remedy available. Furthermore, the plaintiff cannot be forced to frame her cause of action in another alternative area of law merely because it coincides with her chosen remedy.

The distinction in the scope and content of delictual and the constitutional protection of dignity has been noted as it is relevant in choosing the appropriate remedy. The plaintiff has been cautioned that it may not be feasible for the courts to create a constitutional delict¹⁰ because the primary purpose of a constitutional remedy is 'to vindicate guaranteed rights and prevent or deter future infringements'.¹¹ The award of damages for a constitutional wrong is a secondary objective to the constitutional remedy and thus not appropriate for the plaintiff whose primary goal is to seek damages for impairment of right to dignity, which in any event, is adequately

⁷ *Orr & another v University of South Africa* [2004] 9 BLLR 954 (LC) at para 16-7.

⁸ *Lillicrap, Wassenaar and Partners v Pilkington Brothers* 1985 (1) SA 448 (AD).

⁹ *Administrator, Natal v Edouard* 1990 (3) SA 581 (AD).

¹⁰ *Dendy v University of Witwatersrand, Johannesburg and others* [2005] 2 All SA 490 (W) at para 23.

¹¹ *Supra* (n10) at para 20.

protected at *common-law* under the *actio iniuriarum*.¹² However, damages could be an appropriate relief in a constitutional case where 'the only appropriate relief that, in the particular circumstances of the case, would appear to be justified is that of "constitutional" damages'.¹³ It is concluded that it is unlikely that the courts will make this exception in sexual harassment cases by granting constitutional damages because there are quite a number of alternative and overlapping remedies available to the victim of sexual harassment.

A central focus of this thesis is that sexual harassment is not compensable in terms of the COIDA because sexual harassment does not 'arise out of employment' (even though it occurs in the course of employment). For the purposes of the COIDA, the occupational injury and an accident must 'arise out of' and 'in the course of' employment. It is concluded that sexual harassment does not arise out of employment because it is 'specific to the victim'¹⁴ and is not attributable to the employee's terms and conditions of employment or job description - and is not causally connected thereto as to be considered part of the plaintiff's service to the employer in fulfilling the contract of employment.

In any event, the COIDA compensates for physical injuries, medical costs and pecuniary benefits which are capped in terms of minimum and maximum amounts payable and not for non-pecuniary loss (which consists of violation of personality rights which entail damage to the plaintiff's self-esteem, dignity, reputation and privacy) often sustained in sexual harassment cases. Therefore, the COIDA is not a viable remedy and it is proposed that any attempt to raise the jurisdictional defence to remove the plaintiff's right to *common-law* damages must be discouraged.

¹² *Ibid.*

¹³ *President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd* [2004] 3 All SA 169 (SCA) at para 43.

¹⁴ *Popovich v Irlando* 811 P 2d 379 (Colo 1991) at 383.

It is concluded that the value of criminal remedies cannot be understated because in many instances, the perpetrator is a man of straw and it will be a futile exercise to pursue a civil claim against him. It has been established that the criminal remedy against the perpetrator serves to ensure that he pays his due for the crime by being punished by the state. The civil remedies discussed in the thesis are often brought against the *employer* [civil action can be brought against either employer or employee] on grounds of personal liability, *statutory* vicarious liability in terms of the EEA or *common-law* vicarious liability.

The development of the law on sexual harassment in South Africa has also been critically reviewed in the light of the historical development and current law on sexual harassment. It is concluded that great strides have been made by the judiciary to review, develop, and improve the *common-law* principle of vicarious liability to offer protection to the victims of sexual harassment. It is emphasized that *K v Minister of Safety and Security*¹⁵ enhanced the *common-law* remedy of vicarious liability by adopting a broader approach to 'scope of employment' when it found for the first time in South African history, that rape could form part of the scope of employment. The message has been noted that sexual harassment can no longer be shunned whilst it violates the plaintiff's constitutional rights. Therefore, it is concluded that intentional wrongdoing and frolic of one's own can indeed fall within the scope of employment where there is a strong link between the employment and the wrongful conduct.

It has been shown how O'Regan J in *NK (CC)*¹⁶ relied on Canadian and English authorities.¹⁷ This was done by broadening the 'scope of employment' test to include approaches compatible with an abuse of power and trust; 'frolic of one's own'; enterprise risk; mismanagement of duties; and abuse of

¹⁵ [2005] 8 BLLR 749 (CC).

¹⁶ *Ibid.*

¹⁷ *Bazley v Curry* [1999] 2 SCR 534, *Jacobi v Griffiths* [1999] 2 SCR 570 and *Lister and others v Hesley Hall Ltd* [2001] UKHL 22.

supervisory authority - and focused on the sufficiently close nexus between the wrongful conduct and the employment. It is concluded that the context of mismanagement of duties is the key factor in overcoming the argument that a supervisor or a fellow employee who sexually harasses a co-worker is merely on a frolic of his own and his conduct falls outside the scope of employment.

It is observed that the South African, Canadian, and English authorities stress a sufficiently strong link between the employment and the wrongful conduct - a nexus so strong that it would pass the limitation clause test in section 36 of the Constitution. In those instances (sufficiently strong link), it would be just and equitable to hold the employer vicariously liable in an open and democratic society based on human dignity, equality and freedom. *NK (CC)*¹⁸ is thus in harmony with Canadian and English law. It is concluded that the causal link (sufficiently close nexus) is essential in curbing the scope of *common-law* vicarious liability and so as not to make it an open ended liability since it is a no fault liability and will therefore keep the application and scope of the principle of vicarious liability within reasonable bounds.

It is concluded that *common-law* vicarious liability is more onerous to establish in that the plaintiff must prove a nexus between the wrongful conduct and the employment, a nexus so strong as to lead the court to conclude that the employer is vicariously liable for sexual harassment committed by the employee. However, *NK (CC)*¹⁹ has established that rape may be within the course of employment and in so doing, has opened up some possibilities for *common-law* vicarious liability in the context of sexual harassment.

*NK (CC)*²⁰ also stressed the policy dimension of vicarious liability and spelt out the relevant factors in a way that could be adapted to provide

¹⁸ *NK (CC)* supra (n15).

¹⁹ *Ibid.*

²⁰ *Ibid.*

guidance for developing the scope of vicarious liability in cases of sexual harassment in the workplace, which include a minimum of the following:

- a) The mandate of the court in terms of sections 39(2) and 173 of the Constitution;
- b) The constitutional rights violated as a result of sexual harassment;
- c) The special fiduciary relationship which enhances the harasser's ability to abuse the trust and confidence of the plaintiff;
- d) Enterprise risk;
- e) Supervisory harassment between a supervisor, who is in a dominant position to effect a tangible employment action, and a subordinate with no organizational power.²¹
- f) The extent to which the mismanagement of duties constitutes an improper way of executing authorised tasks or omitting to do that which the perpetrator is authorised to do; and
- g) A sufficiently close link between the conduct and the employment.

The risk approach adopted in *Grobler v Naspers Bpk & Another*²² accounts for the reality of modern employment, and how supervisors or caretakers can be an instrumentality of danger to the people under their care and supervision at work. The enterprise risk thus creates a nexus between the employment and the wrongful conduct in that the courts will examine the extent to which the enterprise materially contributed to the commission of the wrongful conduct as noted by the Canadian and English authorities.²³ It is concluded that risk is only relevant as a *factor* and any attempt to replace 'risk'

²¹ See also *Ntsabo v Real Security CC* [2004] 1 BLLR 58 (LC) and *Grobler v Naspers Bpk & Another* 2004 (5) BLLR 455 (C) which involved supervisory harassment.

²² *Ibid.*

²³ *Supra* (n17).

as a new test to ground vicarious liability must be discouraged. A more expansive approach to *common-law* vicarious liability in South Africa is thus welcomed only within the existing principles of vicarious liability.²⁴ There is no reason for the scope of employment test to be abandoned because section 39(2) of the Constitution enjoins the courts to find creative ways to develop *common-law* with due regard to the spirit, objects and purport of the Bill of Rights. It is concluded that the 'scope of employment' test must be retained so as to help underscore that sexual harassment is a workplace event, which occurs within the scope of employment.

The Supreme Court of Appeal in *Media 24 Limited, Gasant Samuels v Sonja Grobler*²⁵ reached a significant finding when it extended the scope of the employer's duty to take reasonable steps to protect employees from physical harm caused by physical hazard, to include a duty to protect employees from psychological harm caused by sexual harassment. This gave effect to the constitutional right²⁶ to psychological integrity, which is often impaired by sexual harassment. *Grobler* (SCA) has further extended the basis of an employer's duty to prevent sexual harassment in the workplace and to compensate the victim for harm negligently caused, to the legal convictions of the community, which are not dependent on the contract of employment or statutory remedy.²⁷ The effect of this finding was therefore to communicate to employers a message of zero tolerance for sexual harassment in the workplace. It has therefore been established that the basis of the employer's duty to prevent and remedy sexual harassment arises out of the contract of employment, corporate governance, the *common-law* duty of care, a statutory remedy, and the legal convictions of the community.

²⁴ NK (CC) *supra* (n15).

²⁵ [2005] 7 BLLR 649 (SCA) at para 65.

²⁶ S 12(2) Constitution.

²⁷ *Supra* (n25) at para 68.

Employers face the risk of a finding of personal negligence in the light of *Ntsabo v Real Security CC*²⁸ for failure to guard against the foreseeable risk of sexual harassment. Both *Ntsabo*²⁹ and *Grobler (SCA)*³⁰ cases have sent a strong message that the employer is under a non-delegable duty to be proactive and provide a sexual harassment-free work environment to all employees. All the recent judicial precedents of *Ntsabo*, *Grobler (C)*, *Grobler (SCA)* and *NK (CC)*³¹ have laid a foundation for the future direction and development of the law on sexual harassment. These judgments have been landmark judgments, which have received media attention and thereby promoted consciousness of the harm of sexual harassment in the workplace. The aforementioned cases have strengthened legal protection against gender discrimination in the workplace and in turn restored confidence in the role of the judiciary in protecting victims of sexual harassment. It is therefore concluded that the law has the potential to deal adequately with sexual harassment cases in the workplace but only if attention is paid to the proposed emphasis and suggestions made in the thesis.

²⁸ *Supra* (n21).

²⁹ *Ibid.*

³⁰ *Supra* (n25).

³¹ *Ntsabo supra* (n21), *Grobler (C) supra* (n21), *Grobler (SCA) supra* (n25) and *NK (CC) supra* (n15).

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Table of Abbreviations

<i>Cambridge L J</i>	Cambridge Law Journal
<i>Cardozo Women's L J</i>	Cardozo Women's Law Journal
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
<i>Colum L Rev</i>	Columbia Law Review
<i>Cornell L Rev</i>	Cornell Law Review
EEA	Employment Equity Act 55 of 1998
<i>Geo LJ</i>	Georgetown Law Journal
<i>Harv L Rev</i>	Harvard Law Review
ILJ	Industrial Law Journal
<i>Int J Comp Lab Law Ind Relat</i>	International Journal of Comparative Labour Law and Industrial Relations
LRA	Labour Relations Act 66 of 1995
<i>Old LRA</i>	Labour Relations Act 28 of 1956
SAJHR	South African Journal of Human Rights
SALJ	South African Law Journal
<i>SA Merc LJ</i>	South African Mercantile Law Journal
SDA	Sex Discrimination Act of 1975
<i>Stan L Rev</i>	Stanford Law Review
<i>U Cin L Rev</i>	University of Cincinnati Law Review

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